REPORTS AND CASES,

Collected by the Learned

Sr. John Popham Kt.

Late LORD CHIEF JUSTICE OF

ENGLAND.

Written with his own Hand in *French*, and now faithfully tranſlated into *Engliſh*.

To which are added ſome Remarkable CASES Reported by other Learned Pens ſince his death.

With an Alphabetical Table, wherein may be found the Principal Matters contained in this Book.

The Second Edition, Corrected.

LONDON,
Printed by the Aſſigns of *Richard* and *Edward Atkins*, Eſquires. For *John Place*, and are to be ſold at his Shop at *Furnivals-Inne*-Gate in *Holborn*. 1682.

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Gate in *Holborn*. [illegible]

TO THE
READER.

Courteous Reader,

ALbeit the name of the Compiler of the greateſt part of the enſuing REPORTS (for *Denominatio ſit a parte majori & meliori*) would be a ſufficient invitation to any underſtanding Reader, not only to caſt his Eye upon, but ſeriouſly to peruſe them; yet becauſe theſe two Queſtions may (and no doubt will, and that upon good ground) be made: as, 1. Why they ſhould lye ſo long in private hands, without being expoſed to the publick view? 2. Why they ſhould be now Printed?

To the firſt I anſwer, That by the handſome compoſure and connexion of them, it may (and that very probably) be conjectured, that the honourable Compiler at firſt intended them for the publick, but they (after his death) coming into private hands, they who became poſſeſſors of them, did rather intend their own, and their friends private knowledge and advantage by them, than to let others communicate therein: for it hath not formerly been (neither yet is) a thing unuſual, for the great and learned Profeſſors of the Law, to ingroſs into their own hands the beſt, and moſt authentick REPORTS, for their better help, credit and advantage in the courſe of their practiſe; which being unknown to other men, they cannot upon ſudden occaſions, be ready to make anſwer thereunto: and that might be the reaſon why they have not been as yet publiſhed.

To the ſecond I anſwer, that the Copy (out of which this Tranſlation was made) coming out of the Library

of a reverend and learned Serjeant at Law now deceaſed, and ſaid therein to be written with the proper hand-writing of the Lord POPHAM (a good ground to conceive that it was Authentick) the Gentleman, in whoſe hand it was, was earneſtly importuned for the Copy, that ſo it might be made publick; to whoſe importunity there was at laſt a condeſcention, ſo as ſuch due care might be taken both in the Tranſlation and Printing, as not to prejudice the Author, or the matter therein contained: And whether that condition be fully performed, ſhall be now left to the candid interpretation of the judicious Reader, who cannot but know that ſome *Errata's* (let the Printer or Corrector be never ſo careful) will follow the Preſs; but it is hoped that nothing material or ſubſtantial is committed or omitted to the prejudice of the Work, or of the Compiler thereof. There is an addition of ſome later Caſes in the time of King JAMES, and the late King CHARLES, which were taken by judicious Pens, as will evidently appear by the Caſes themſelves; and I dare ſay, that whoever reads them, will neither think his Time or Money miſpent, they being ſuch as are well digeſted, and very practical. I ſhall add this one thing more, that the principal end of this Edition is, the advancement of Knowledge, and to impart the good thereof to thoſe who heretofore wanted what is hereby made publick, which may (peradventure) be a means to invite others more learned to publiſh other things of the like nature, for the benefit of Students, and Profeſſors of the Law.

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CASES

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Reported by

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Lord Chief Justice of

ENGLAND,

In the time of Queen ELIZABETH.

And written with his own Hand in *French*, and now faithfully done into *English*. To which are added some remarkable CASES, Reported by other Learned and Judicious Pens, since his death.

Fenner *versus* Fisher.

Mich. 34 and 35 *Eliz. Reginæ*, in the King's Bench.

IN Trespass brought by Justice Fenner against Andrew Fisher, for a Trespass done in the Parsonage House of Crayfords in the County of Kent 30. Mail 34 of the Queen, the Defendant pleaded that one was seized of the same Messuage in his Demesne as of Fee, and being so seised, the day of in the same year, did demise it to the Defendant for two years, from such a Feast then last past; by virtue of which he entred and was possessed, until the Plaintiff claiming by colour of a Deed made of the said Wright where nothing passed by the Deed, upon which the Defendant entred, &c. The Plaintiff replies by protestation, that the said Wright was not seised as the Defendant hath alledged: And for Plea saith, that the said Wright did not let it to the Defendant, as the Defendant hath alledged upon which being at Issue, it found for the Plaintiff. Atkinson moved, that Judgment ought not to be given for the Plaintiff, because that he hath not made any Title by his Replication, for by 9 E. 4. 49. In Trespass the Defendant pleads in War and gives colour to the Plaintiff, it is taken for a Rule that the Plaintiff ought to make Title: Coke answered, that he needs not to make Title in this case, but that it sufficeth to traverse the War without making a Title, and said that in 22 E. 4. Fitzh. Trespass, It is adjudged that in Trespass the Plaintiff may traverse the War without making Title in his Replication; and here in as much as it is acknowledged by the Defendant, that Wright did demise it to the Plaintiff, and that this is a Lease at will at the least not defeated by his own shewing, but by the Lease made to the Defendant. This being traverfed, and found against the Defendant, the Plaintiff, by the acknowledgment of the Defendant himself, hath a good Title against him to enter into the Land, and by it the Defendant by his Re-entry is become Trespasser to the Plaintiff; and he said, that in 2 E. 4. fol. In Trespass where the Defendant pleads that he let the Land to the Plaintiff for another man's life, and that he

for whose life it was, was dead, upon which he entred, and it is adjudged that it sufficeth for the Plaintiff to maintain that Cestuy que vie was yet living without making any other Title. And yet for these reasons Clench and Gawdy held the Replication good, to which Popham said, that we as Justices ought not to adjudge for the Plaintiff where a good and formal bar is pleaded as here it is. But where by the Record it self which is before us, we cannot see that the Plaintiff hath good cause of Action: And therefore I agree that in Trespass in some cases the Plaintiff may traverse the Bar or part of it, without making any other Title than that which is acknowledged to the Plaintiff by the Bar, but this always ought to be where a Title is acknowledged to the Plaintiff by the Bar, and by another means destroy'd by the same Bar, for there it sufficeth the Plaintiff to traverse that part of the Bar which goeth to the destruction of the Title of the Plaintiff comprised in the Bar, without making any other Title, but if he will traverse any other part of the Bar, he cannot do it without making an especial Title to himself in his Replication whereby the Bar the first possession appeareth to be in the Defendant, because that although the Traverse there be found for the Plaintiff, yet notwithstanding by the Record in such a Case the first Possession will yet appear to be in the Defendant, which sufficeth to maintain his Regress upon the Plaintiff, and therefore the Court hath no matter before them in such case to adjudge for the Plaintiff, unless in cases where the Plaintiff shews a special Title under the Possession of the Defendant; As for example, in Trespass for breaking of his Close, the Defendant pleads that J.G. was seised of it in his Demesne as of Fee, and enfeoffed J.K. by virtue of which he was seised accordingly, and so being seised, enfeoffed the Defendant of it, by which he was seised, until the Plaintiff claiming by colour of a Deed of Feoffment made by the said J. G. long before that he enfeoffed J. K. (where nothing passed by the said Feoffment) entred, upon which the Defendant did re-enter, here the Plaintiff may well traverse the Feoffment supposed to be made by the said J. G. to the said J. K. without making Title, because that this Feoffment only destroys the Estate at will made by the said J.G. to the Plaintiff, which being destroyed he cannot enter upon the Defendant, albeit the Defendant cometh to the Land by Disseisin, and not by the Feoffment of the said J. K. For the first Possession of the Defendant is a good Title in Trespass against the Plaintiff, if he cannot shew or maintain a Title Paramount. But the Feoffment of the said J. G. being traversed and found for him, he hath by the acknowledgment of the Defendant himself a good Title against him, by reason of the first Estate at will acknowledged by the Defendant to be to the Plaintiff, and now not pretended: But in the same case he cannot traverse the Feoffment supposed to be made to the said J. K. to the Defendant, without any especial Title made to himself; for albeit that J. K. did not enfeoff the Defendant, but that the Defendant disseised him, or that he cometh to the Land by another means, yet he hath a good Title against the Plaintiff by his first Possession, not destroyed by any Title Paramount, by any matter which appeareth by the Record, upon which the Court is to adjudge; and with this accord the opinion of 31 E. 4. 1. That the material matter of the Bar ought always so be traversed, or otherwise that which upon the pleading is become to be material, and that which the Plaintiff traversed here, to wit, the Lease made by Wright to the Defendant is the material point of the Bar which destroyed the Title Paramount acknowledged to the Plaintiff by the colour given in the Bar which is good without another Title made: So note well the diversity where in pleading in Trespass the first Possession is acknowledged in the Plaintiff by the Bar, and where it appeareth by the pleading so be in the Defendant, and where, and by what matter the first Possession acknowledged in the Plaintiff by the Bar is avoyed by the same Bar; And upon this, Judgment was given for the Plaintiff, as appeareth in 34 and 35 Eliz. Rot.

Earl

Earl of *Bedford* verſus *Eliz.* & *Anne Ruſſel.*
Mich. 34 and 35 *Eliz.*

2. IN the Court of Wards the Caſe was thus, between the now Earl of Bedford, and Elizabeth and Anne the Daughters and Heirs of John, late Lord Ruſſell, which was put ten times to all the Juſtices to be reſolved: Francis late Earl of Bedford, was ſeiſed of the Manno of Barunke Chaldon, &c. in Comitatu Dorſet, in his Demeſne as of Fee, and is ſeiſed the fourth year of Queen Eliz. of it enfeoffed the Lord St. John of Bletſoe, and others in Fee, to the uſe of himſelf for forty years, from the date of the ſaid Deed, and after to the uſe of the ſaid John then his ſecond Son, and the Heirs Males of his body; and for default of ſuch Iſſue, then to the uſe of the right Heirs of the ſaid Earl the Feoffor for ever: Afterwards Edward Lord Ruſſel Son and Heir Apparent to the ſaid Earl died without Iſſue, and after the ſaid John Lord Ruſſel died without Iſſue Male, having Iſſue the ſaid two Daughters, afterwards to wit 27 Eliz. the ſaid Francis Earl of Bedford, by Indenture made between him and the Earl of Cumberland and others in conſideration of the advancement of the Heirs Males of the body of the ſaid Earl, which by courſe of deſcent ſhould or might ſucceed the ſaid Earl, in the name and dignity of the Earldom of Bedford, and for the better eſtabliſhment of his Lordſhips Mannors and Hereditaments, in the name and blood of the ſaid Earl, covenanted and granted with the ſaid Covenantées, that he and his Heirs hereafter ſhall ſtand ſeiſed of the ſaid Mannors (amongſt others) to the uſe of himſelf for life, without impeachment of Waſte, and after his deceaſe to the uſe of Francis the Lord Ruſſell, and the Heirs Males of his body; or for default of ſuch Iſſue, to the uſe of Sir William Ruſſell Knight, his youngeſt Son, and the Heirs Males of his body, with divers Remainders over: after which the ſaid Francis Lord Ruſſell dies, having Iſſue Edward the now Earl of Bedford, and after this the ſaid Francis late Earl of Bedford died alſo, and after the Daughters of the ſaid John Lord Ruſſell, or the now Earl of Bedford, ſhall have theſe Mannors of Barunke, &c. was the queſtion; and upon this it was argued by Coke, Jollinton and others, for the Daughters, that an uſe at Common Law, was but a confidence put in ſome to the benefit and behoof of others, and that Conſcience was to give remedy, but for thoſe for whoſe avail the confidence was, and that was in this Caſe, for the ſaid Daughters which were the right Heirs to the ſaid Francis late Earl of Bedford, upon the firſt conveyance made 41 Eliz. for the confidence that he put in the Feoffees, as to the profits that he himſelf was to have, was but for the forty years, and how can any other ſay that he ſhall have any other Eſtate, when he himſelf ſaith, that he will have it but for forty years: and therefore in this caſe his right Heir ſhall take as a Purchaſor, by the intent of the Feoffor which hath power to make a diſpoſition of the uſe at his pleaſure, and his pleaſure (as appeareth) was to have it ſo, and it is not as if the uſe had been limited to be to himſelf for life with ſuch a Remainder over, in which Caſe the uſe of the Fee by the operation of Law ought to execute in himſelf for the Free-hold which was in him before: As where Land is given to one for life, the Remainder to his right Heirs, he hath a Fee-ſimple executed, but here he ſhall have but an Eſtate for forty years precedent, and that the Fee-ſimple cannot be executed by ſuch a limitation made to the right Heirs; but in caſe of an Eſtate for years only precedent ſuch a limitation to his right Heirs afterwards is not good, but in caſe of an uſe it is otherwiſe, for it may remain to be executed, to be an uſe in Eſſe where the right Heir ſhall be, and therefore not to be reſembled to an Eſtate made in Poſſeſſion. And an Uſe is always to be guided according to that which may be collected to be the purpoſe and intent of the parties: And therefore if a man make an Eſtate of his Land without limitation of any Uſe or confidence, the Law ſhall ſay that it is to his own uſe, but if it be upon confidence then it ſhall be to

In the Court of Wards.

the Uſe of the party to whom it is made, or according to the confidence which ſhall be abſolute, or according to that which is limited, which may alter that which otherwiſe ſhall be taken upon the general confidence, as 30 H. 6. Fitz. Deviſe, If a man deviſe Lands to another in Fee, he hath the uſe and Title of it, but if it be limited to his uſe for his life only, the uſe of the Fee ſhall be to the Heir of the Deviſor, for by the limitation his intent ſhall be taken to be otherwiſe, then it ſhould be taken if this limitation had not been; and in as much as in this caſe the Earl reſerves to himſelf but the uſe for years, it is evident that his intent never was to have the Fee, to ſurrender this Term, which perhaps he intended to be for the benefit of his will, which ſhall be defeated contrary to his purpoſe, if the Fee ſhall be alſo in him by the death of the ſaid John, without Iſſue Male, and therefore the ſaid Daughters ought to have the Land. And on the other part it was argued by Glanvil Serjeant, and Egerton the Attorney General, that this limitation made to the right Heirs, is void in the ſame manner, as if a man give Lands to another for life, the Remainder to the right Heirs of the Feoffor, in this caſe the Heir ſhall take by deſcent as a Reverſion remaining to the Feoffor, and not as a Remainder devеſted out of him, for the ancient right privilege the Eſtate which he may take, and therefore he ſhall take it by deſcent, and not by purchaſe; for the name of right Heir is not a name of purchaſe betwixt the Anceſtor and his heir, becauſe that doth inſtance that he happened to be heir, he takes it by deſcent, and then it comes too late to take by purchaſe. And another reaſon that the Daughters ſhould not have it is, becauſe that when Sir John Ruſſel dies without Iſſue Male, which Eſtate might have preſerved the Remainder, if it ſhall be a Remainder, there was not any right heir of the ſaid Francis Earl of Bedford to take this Remainder, becauſe that the ſaid Earl ſurvived him: And therefore it is to be reſembled to this Caſe; Land is given in Tail, the Remainder to the right Heirs of J. G. the Donee dies without Iſſue in the life of J. G. in this caſe, albeit J. G. dies afterwards having an heir, yet this heir ſhall never have the Land, becauſe he was not heir in Eſſe to take it when the Remainder fell, and for the mean Eſtate for years this cannot preſerve a Remainder, no more than when Land is given for years, the Remainder to the right heirs of J G. this Remainder can never be good if J. G. be then living, becauſe ſuch a Remainder cannot depend but upon a Free-hold precedent at leaſt, and therefore the Inheritance here ſhall go to the now Earl of Bedford by the ſecond aſſurance. And upon conſideration of the Caſe and ſeveral Conferences had upon this amongſt the Judges and Barons, it was at laſt reſolved by all (but Baron Clarke) that the Daughters ſhall not have the Mannors in the County of Dorſet, but the now Earl of Bedford, and principally upon this reaſon, becauſe there was no right heir to take as Purchaſor where the mean Eſtate Tail was determined, which was by the Lord John, without Iſſue Male, for they agreed that the Remainder to the right heirs, if it be a Remainder, cannot be preſerved by the mean Eſtate for years, for it ought to be a Free-hold at leaſt which ought to preſerve ſuch a Remainder, until there be one to take it by name of Purchaſor as right heir. And at this day they did not think there was any diverſity between the Caſe of a Remainder in Poſſeſſion limited to the right heir of one, and of a Remainder in uſe ſo limited over to another.

Mich. 34 and 35 *Eliz.* In the King's Bench.

3. IN Ejectione firmæ upon ſpecial verdict the caſe was thus, A man poſſeſſed of a Term of years in right of his wife, made a Leaſe for years of the ſame Land to begin after his death which was the Leſſor, and afterwards he dyed and his Wife ſurvived him, and the queſtion was, whether the wife ſhall have the Land after the death of the husband, or the Leſſee, for if the husband had devi-

ſed

viſed the ſame Land to an eſtranger, yet the Wife ſhall have it and not the Deviſee, as it happened in the Caſe of Matthew Smith, who made firſt ſuch a Deviſe of a Term of his Wife, and yet the Wife had it; becauſe that by the death of the husband (before which the Deviſe did not take effect) the Wife had it in her firſt Right not altered in the life of her Husband; but it was agreed in this caſe by all the Court, that the Leſſee ſhall have it during his Term, for as the husband during his life might contract for the Land for the whole term which the wife had in it, ſo might he do for any part of the term at his pleaſure, for if he may deviſe the Land for one and twenty years to begin preſently, he alſo may make it to begin at any time to come after his Death, if the term of the Wife be not expired, but for the Remainder of the term of the Husband, made no diſpoſition during his life, the Wife ſhall have it, which by Popham this Caſe happened upon a ſpecial Verdict in the County of Somerſet, about 20 Eliz. where he and Serjeant Baber were Practiſers in the Circuit there, to wit, the Lands were demiſed to Husband and Wife for their lives the Remainder to the Survivor of them for years, the Husband granted over this term of years and died, and the queſtion was whether the Wife ſhall have the term of years or the Grantee, and adjudged that the Wife ſhall have it, and it was upon this reaſon, becauſe there was nothing in the one or the other to grant over, until there was a Survivor: And the ſame Law had been if the Wife had died after the Grant, and the Husband had ſurvived, yet he ſhall have the term againſt his own Grant; as if a Leaſe were made for Life, the Remainder for years to him which firſt cometh to Pauls, if A. grant this Term for years to another, and afterwards A. is the firſt that cometh to Pauls, yet the Grantee ſhall not have this Term becauſe it was not in A. by any means neither in Intereſt nor otherwiſe until he came to Pauls; As if a man make a Leaſe for life, the Remainder to the right Heirs of J. S. J. S. hath Iſſue a Son which ſelleth this Remainder, and afterwards J. S. died, this Son being his Heir, notwithſtanding his Sale, he ſhall have this Remainder and not his Grantee, becauſe it was not in him at the time of his Grant, but by a matter which cometh, Ex poſt facto, to wit the death of his father, and afterwards Judgment was given in the firſt caſe, that the Grantee ſhall have the term granted to him by the Husband, and that the Wife ſhall not have the term during this Leaſe.

Hunt *Verſus* Gateler.
Mich. 34 and 35 *Eliz.* in Commun. Banco.

IN a Replevin between Hunt Plaintiff and Gateler Avowant in the Common Pleas, which was adjourned for difficulty into the Exchequer Chamber, the Caſe was thus, Tenant in Tail, Remainder in Fee, he in Remainder in Fee grants a Rent-charge in Fee out of the ſame Land, to begin after the Eſtate Tail determined, Tenant in Tail ſuffers a common Recovery with a Voucher over, to the uſe of the ſaid Hunt in Fee, and died without Iſſue inheritable to the Intail, and whether Hunt ſhall now hold the Land charged with the Rent, was the queſtion; and after that it had long depended, and was many times argued in the Common Pleas, and Exchequer Chamber, at Hertford Term, it was at laſt reſolved by all the Juſtices and Barons unanimouſly, that the ſaid Rent-charge was gone by the Recovery, although the Eſtate Tail was expired, becauſe that he which is in, is in under this Intail: And therefore Popham ſaid, ſuppoſe that the Tenant in Tail himſelf before the Recovery had granted a Rent-charge out of the ſame Land, or had made a Leaſe for years, or had acknowledged a Statute, all theſe had been good, and to be executed againſt him which cometh in under the Recovery, notwithſtanding that the Eſtate Tail had been determined for want of an Heir inheritable to

Vide this caſe *Coke lib.* 1. 61. by the name of *Capel*'s caſe.

to the Intail, for he which recovereth cannot ſay that he againſt whom he recovered had but an Eſtate in Tail, and if his Leaſe remain yet good (as all agreed it did) how can the Leaſe, a Rent granted by him in the Remainder, be good alſo, for the one and the other cannot ſtand together, and therefore all the Leaſes, Charges, or Statutes acknowledged or made by him in the Remainder, are gone and avoided by the Recovery had againſt Tenant in Tail. To which opinion all the other agreed, and Popham ſaid further, That he in the Remainder upon an Eſtate Tail, cannot by any means plead to defend his Remainder, unleſs the Tenant will as by vouching of him, and therefore ſhall be bound by the Act of Tenant in Tail, where the Eſtate it ſelf is bound as here it is by the Voucher, and then they which come in by him in the Remainder by way of Leaſe, Charge, or Statute, (which are not ſo much favoured in Law as Tenant in Tail himſelf) be in better condition than he in the Remainder himſelf is; for he in the Remainder upon an Eſtate Tail cannot put more into the mouth of the Leſſee or Grantee to defend their Eſtates, than he himſelf could have to defend his Remainder, and this is the reaſon that ſuch a Termer or Grantee ſhall never falſifie the Recovery had againſt Tenant in Tail, as the Grantee or Termer ſhall do which cometh in under Tenant in Tail againſt whom the Recovery was had, for there as the Tenant in Tail may plead to defend his Poſſeſſion and Eſtate, ſo may his Termer or Grantee of a Rent-charge do, for by the Demiſe or Grant made, the Tenant in Tail hath put all the Pleas into their mouths for their Intereſts which he himſelf had to defend his Right and Poſſeſſion, which they may plead for the time to defend their Poſſeſſions and Rights as well as the Tenant in Tail himſelf may do, and this is the reaſon that ſuch may falſifie Recoveries againſt their Leſſors or Grantors, if they be not had upon the meer right Paramount, which he that cometh in by ſuch a Remainder as before cannot do, for ſuch a one in Remainder cannot be received to defend his Right, but his mouth is meerly foreclofed to do it, and by the ſame reaſon are all thoſe which come in by ſuch men foreclofed to defend their Intereſts or Eſtates, and upon this Judgment was given in the ſame Term in the Common Pleas.

Gibbons *verſus* Maltyard *and* Martin.

Vide *this caſe in* Coke lib. 8. 130. Thetford *Scholes caſe.*

IN an Ejectione firmæ, brought in the Kings Bench by John Gibbons Plaintiff, upon a Demiſe made by Edward Peacock the Son, of Lands in Croxton, in the County of Norfolk, againſt Thomas Maltyard and John Martin, upon a ſpecial Verdict, the caſe appeared to be thus, to wit, that Sir Richard Fulmerſton Knight, was ſeiſed of the ſaid Lands (amongſt others) holden in Socage in his Demeſne as of Fee, and being ſo ſeiſed by his laſt Will in Writing, made 9 Eliz. Ordained that a Deviſe ſhall be made by his Executors that a Preacher ſhall be found for ever to preach the Word of God in the Church of Saint Maries in Thetford, four times in the year, and to have for his labour ten ſhillings for every Sermon. And further he deviſed to his Executors and their Heirs certain Lands and Tenements in Thetford aforeſaid to this intent, and upon this condition, that they or the Survivor of them within ſeven years after his decreaſe, ſhould procure of the Queens Highneſs to erect a free Grammar School in Thetford for ever to be had and kept in a houſe by them to be erected upon part of the ſaid Land, and that they ſhall aſſure thole of the ſaid Tenements for the Houſe and Chamber of the Schoolmaſter and Uſher, and their Succeſſors for ever, and for the other Tenement, that they ſhall make an aſſurance of it for the Habitation of four poor people (two men and two women) for ever. And for the better maintenance of the ſaid Preacher, Schoolmaſter, Uſher and poor People, he

he deviſed (amongſt others) his ſaid Tenements in Croxton to his Execu-
tors for ten years for the performance of his Will, and after this he deviſed
them to Sir Edward Cleer, and Frances his Wife (the Daughter and
Heir of the ſaid Sir Richard) and to the Heirs of the ſaid Sir Edward,
upon Condition, that if the ſaid Sir Edward his Heirs or Aſſigns,
before the end of the ſaid ten years ſhall aſſure Lands or Tenements in
poſſeſſion to the value of five and thirty pounds a year, to the ſaid Executors
or the Survivor of them, their Heirs and Aſſigns, or to ſuch perſons their
Heirs and Succeſſors as his ſaid Executors or the Survivor of them ſhall
name or aſſign for and towards the maintenance of the ſaid Preacher,
Schoolmaſter and Uſher, in the ſaid School-houſe, &c. and for the reliefe of
the ſaid poor people in the one of the ſaid houſes, according to the Ordinance
as he himſelf in the ſaid Will had declared, or otherwiſe as by his Executors
or the Survivor of them ſhall be preſcribed. And if the ſaid Sir Edward and
his Heirs ſhall make default in the aſſurance of the ſaid Land by him to be
aſſured as aforeſaid, then he will that immediately upon ſuch default, his
Eſtate, and the Eſtate of the ſaid Frances ſhall ceaſe in the ſaid Lands in
Croxton, &c. and then he deviſe the ſame Lands to his Executors and their
Heirs for ever to the uſe of them and their Heirs upon truſt and confidence
that they or the Survivor of them and their Heirs ſhall aſſure the ſame, or
otherwiſe yearly diſpoſe the profits of them in finding the ſaid Preacher and
other charitable works as aforeſaid, and made Edward Peacock father to the
Leſſor (whoſe Heir the Leſſee is) and others his Executors, and died 9.
of the Queen, after whoſe Death all the Executors refuſe to be Executors.
The ſeven years paſs without the eſtabliſhing of the School, and other things
according to the Will for the firſt part of it, whereby the Land in Thetford
was forfeited to the Heir for the Condition broken, and within the ten years
Sir Edward Cleer made a Feoffment of Land to the value of 35 l. a year to
the ſurviving Executor, for the uſe of the School, but with a condition con-
trary to the Will, and no Livery was made upon the ſaid Feoffment, but it
was inrolled of Record in the Chancery, whereby the ſaid Sir Edward had
broken the Condition annexed to his Eſtate, and alſo during all this time
neither the Executors nor their Heirs had done any thing in finding the
Preacher or the other works of Charity with the profits of the ſaid Lands in
Croxton, or in aſſuring of it according to the Will, and yet the ſaid Edward
Peacock the Son in September 32 Eliz. being Heir to the ſurviving Exe-
cutor, entred into the Land in Croxton, and demiſed it to the Plaintiff for
ſeven years, upon which the Defendant as Servant, and by the command-
ment of Sir Edward Cleer, and of Edmond the Son and Heir of the ſaid
Frances (who was then dead) entred, upon which Entry and Ejectment the
Action was brought, and it was moved by Godfrey and others that the Entry
of the Defendants was lawful, firſt in the right of the ſaid Sir Edward, be-
cauſe that his Eſtate by the Statute of 23 H. 8. cap. was without con-
dition, or determined; becauſe that by this Statute all the uſes limited in ſuch
a manner are made void, becauſe they are in the nature of a Mortmain, as
may appear by a Proviſo at the end of the ſame Statute for a certain perſon
of Norwich who had deviſed Lands for the eaſe of the poor Inhabitants of
the ſame City, in Taxes and Tallages, and for cleanſing of ſtreets there,
and for diſcharge of Toll and Cuſtom within the City, all which were good
uſes, and not tending to Superſtition, and yet if it had not been for the Pro-
viſo they had been gone by the body of the Statute: and the Statute ordained
alſo, that every penalty and thing which ſhall be deviſed to defraud this Sta-
tute ſhall be void, and if this do not help them, yet the Entry made in the
right of the ſaid Heir, of Sir Richard Fulmerſton, is good; for the Eſtates of
the ſaid Executors are alſo bound as with a cuire condition that theſe things
ſhall be performed which are not done, and therefore the Entry in right of the

Heir

Heir is lawful, for the words Ad propoſitum, ea intentione, and the like in a Will are good Conditions which Gaudy agreed, and vouched the caſe 28. Seſſ. Pl. but it was after often argument agreed by all the Court that the firſt exception was to no purpoſe, for they conceived that this Statute was to be taken to extend only to the uſes which tend to Superſtition, as might be collected as well by the words of it in the very body of the Act at the beginning, as by the time in which it was made, for at this time they began to have reſpect to the ruin of the Authority of the Pope, and to the diſſolution of the Abbies, Chantries, and the like: And by Popham, the Proviſo was put in the Statute, but for ſatisfaction of the Burgeſſes of the ſame City at this time and not for any neceſſity as oftentimes it happens. And for the other point, he ſaid, that it appeareth fully by the Will that it was not the intent of the ſaid Sir Richard to have the Land in Croxton bound with any condition in the poſſeſſion of his Executors, or with any other matter which determine their Eſtate, for the Words, that they ſhall have it upon truſt and confidence, exclude all conſtraint which is in every condition, and the Will is, that they ſhall have it to the uſe of themſelves and their Heirs for ever, which cannot be if it ſhall be abridged by any Limitation or Determination: And he ſaid, that the Lord Anderſon demanded of him a Caſe which was adjudged in the Common Pleas 29 Eliz. Rot. 639. which was thus; One Michel made a Leaſe for years rendring Rent, and for default of payment a Re-entry with Covenants on the part of the Leſſee to repair the Meſſuages, &c. and the Term continuing, the ſaid Michel, by his Will in Writing, deviſed the ſame Land to the ſaid Leſſee for more years than he had to come in it, rendring yearly the like Rent, and under the ſame Covenants which he now holds it, and died, and afterwards the firſt Term expired, the Leſſee does not repair the Houſes, and the queſtion was, whether by this he hath forfeited his Term, and adjudged that as to this it was not any condition, and a Covenant it could not be, for a Covenant ought always to come on the part of the Leſſee himſelf, which cannot be in this caſe, for he doth not ſpeak any thing in the Will to bind him, but they are all the words of the Deviſor himſelf compriſed in a Will, and it never was his intent to have it to be a condition, and therefore void as to the Leſſee to bind him either by way of Covenant or Condition; ſo here, &c. And for the ſaid Feoffment enrolled without Livery, it was agreed by all, that it was not of any force to make the Land to paſs to the Executors, but the Enrolment concludes him to ſay not his Deed; And alſo that the Executors refuſe to be Executors, this ſhall not hinder them to take by Deviſe as to the Inheritance; whereupon it was adjudged that the Plaintiff ſhall recover as appears.

Thompſon *verſus* Trafford.
Hillary Term, 35. of Queen *Elizabeth.*

IN an Ejectione firmæ, between John Thompſon Plaintiff, and Thomas Trafford Defendant, the caſe was thus. The Preſident and Scholars of Magdelen College in Oxford, 20. Decemb. 8 Eliz. Did let a Meſſuage in the Burrough of Southwark, to which no Land appertained, to William Standiſh for twenty years, from the Feaſt of Saint Michael next enſuing, rendring the ancient Rent, and 25 Octob. 21 Eliz. they did let the ſame Meſſuage to the ſame Standiſh for twenty years from the Feaſt of Saint Michael then next enſuing, rendring alſo the ancient Rent, and 31 Auguſt, 30 Eliz. The Preſident and Scholars made a new Leaſe of the ſame Meſſuage to Sir George Carew Knight, for twenty years from making of the Leaſe, rendring the ancient Rent, which Leaſe was conveyed by mean Aſſignments to the Plaintiff, upon which the Action was brought againſt the ſaid Trafford

which

which had the Intereſt of the ſaid Standiſh by mean Aſſignments: Popham ſaid, that Ipſo facto upon the laſt Leaſe made, and annexed by Standiſh, the firſt Leaſe was determined and gone, for this laſt Contract diſſolves the firſt when the one and the other cannot ſtand together, as they cannot here, becauſe the one interfnix with the other, and ſo was the opinion in the Common Bench about 1 Eliz. in the Caſe of the Abby of Barking, of which I have ſeen a Report.

And here Standiſh before Michaelmas, next after the ſecond Leaſe made to him could not grant over his firſt Term to be good to the Grantee, for if this ſhould be, the ſecond Term ſhall not be good to Standiſh; but for the remnant of the years after, the firſt Term finiſhed, which cannot be becauſe it ſtandeth in the power of the Grantor with the aſſent and acceptance of the Grantee to make the ſecond Grant good, for the whole Term, to wit, from Michaelmas, and this cannot be but by a determination in Law of the firſt Term immediately, which is made by his own acceptance, and therefore a prejudice to none but himſelf, and Volenti non fit injuria, and the firſt Term cannot have his continuance until Michaelmas, but is gone preſently by the acceptance of the ſecond Leaſe in the whole, for the firſt Contract which was entire cannot be ſo diſſolved in part, but in the whole, as to that which the Party hath, and therefore the firſt Term (as the Caſe is here) is gone in the whole, to which Clench and Gaudy agreed; and if ſo, then this laſt Leaſe to Standiſh was but as a Leaſe made to begin at a time to come, which is made good by the Statute of 14 Eliz. if it do not exceed the time of forty years from the making of the Leaſe; for the purpoſe of this Act was, that Colledges and the like ſhall not make Grants in Reverſion, albeit it be for a year, and the reaſon was, becauſe that by ſuch Grants in Reverſion they ſhall be excluded to have their Rent of the particular Tenants for the time: And therefore in the Caſe of the Counteſs of Suſſex, who had a Joynture aſſured to her for her life by Act of Parliament, with a Proviſo, that the Earl her Husband might demiſe it for one and twenty years, rendring the uſual Rent, where the ſaid Earl had made a Leaſe for one and twenty years, according to the Statute, within a year before the end of the ſame Leaſe, the ſaid Earl made a new Leaſe of the ſame Land to Wroth his Servant for one and twenty years, to begin after the end of the former Leaſe, rendring the uſual Rent, and died, the ſaid Counteſs avoided this laſt Leaſe by Judgment given in this Court, becauſe it ſhall be intended to be a Leaſe in Poſſeſſion, which he ought to make by the Proviſo, from the time of the making of it, otherwiſe by ſuch perverſe conſtruction, the true intent of the Statute ſhall be utterly defrauded. But here to make a Leaſe for twenty years to one in poſſeſſion, and to make another Leaſe to another for twenty years, to begin after the end of the former Leaſe, is good, becauſe that the one and the other do not exceed the forty years compriſed in the Statute.

And the Juſtices of the Common Bench the ſame day at Serjeants Inn agreed to the opinion of Popham for the determination of the whole firſt Term, by the taking of the ſecond Term by Standiſh.

Ward *verſus* Downing.

2. IN an Ejectione firmæ brought by Miles Ward against Robert Downing, the Caſe was thus; One Robert Brown was ſeiſed of certain Lands in in the County of Norfolk, in his Demeſn as of Fee (which were of the nature of Gavelkind) and had Iſſue George his eldeſt Son, William his middlemoſt Son, and Thomas his youngeſt Son, and being ſo ſeiſed 6 Decemb. 1559. made his Teſtament in Writing, by which he deviſed the ſaid Tenements in theſe words.

Item, I give unto Alice my Wife the uſe and occupation of all my Houſes and Lands, as well Free as Copy-hold, during her natural life.

Item, I will, that George my Son ſhall have after the deceaſe of his Mother all thoſe my Houſes and Lands, whereof the uſe was given to his ſaid Mother for the term of her life, To have and to hold to him and his Heirs for ever, and if the ſaid George die without Iſſue of his Body lawfully begotten; then I will my ſaid Lands ſhall in like manner remain unto William my Son and his Heirs for ever. And I will that all ſuch Money as ſhall be paid of any Legacy by the ſaid George, ſhall be allowed by the ſaid William, to whom the ſaid George ſhall appoint.

Item, I will, that if the ſaid George and William depart the World before they have Iſſue of their Bodies lawfully: Then I will that all my ſaid Houſes and Lands ſhall remain unto Thomas my Son and to his Heirs for ever.

Item, That if the ſaid George ſhall enjoy my ſaid Houſes and Lands, then I will that the ſaid George ſhall pay out of the ſaid Lands to William and Thomas his Brother 26 l. 13 s. 4 d. that is to ſay, at his firſt Entry into the ſaid Lands, to pay unto the ſaid William his Brother 40 s. and ſo to pay yearly until the ſum of 13 l. 6 s. 8 d. be fully anſwered and paid, and then immediately to pay unto Thomas his Brother 13 l. 6 s. 8 d. to be paid unto the ſaid Thomas, when the ſaid William ſhall be fully anſwered by 40 s. a year, in like proportion as is aforeſaid: And if my ſaid Son George ſhall refuſe to pay unto William and Thomas his Brethren the ſum of 26 l. 13 s. 4 d. in manner and form as is before limited, Then I will that all my Houſes Lands and Tenements with the Appurtenances remain to William my Son and his Heirs for ever, paying therefore 26 l. 13 s. 4 d. viz. 13 l. 6 s. 8 d. to George my Son, and 13 l. 6 s. 8 d. to Thomas my Son, in ſuch manner and ſort as the ſaid George ſhall pay it if he ſhould enjoy the ſaid Lands: And if it fortune the ſaid William to enjoy the ſaid Lands, then the ſaid William ſhall pay unto Thomas his Brother the whole ſum of 26 l. 13 s. 4 d. as is aforeſaid. After which the ſaid Robert died ſeiſed of the ſaid Tenements in queſtion, and his ſaid Wife entred into them for her life by virtue of the ſaid Will, in whoſe life time the ſaid George died without Iſſue, after which the ſaid Thomas alſo, to wit, 9 Dec. 1576. made his Teſtament in writing, and of this made Mary his Wife his Executrix, and died, having Iſſue Martha by the ſaid Mary; Afterwards the ſaid Alice the Wife of the Deviſor, the laſt of March, 32 Eliz. died, and after her death, to wit, the firſt of May, 32 Eliz. the ſaid William entred into the ſaid Tenements, and was thereof ſeiſed in his Demeſn as of Fee-tail, and the ſaid Mary in the life-time of the ſaid Alice proved the Teſtament of the ſaid Thomas Brown, and the ſaid William did not pay the ſaid 26 l. 13 s. 4 d. to the ſaid Mary, nor any part thereof according to the Will, and the ſaid Martha being Daughter and Heir of the ſaid Thomas thereupon entred into the ſaid Tenements, and did let the ſaid Poyety of which the ſaid Action was brought to the ſaid Ward for two years, upon which the ſaid Downing in the Right and by the Commandment of the ſaid William re-entred, and expelled the ſaid Plaintiff, but the

concluſion

concluſion of the Verdict was not upon the expulſion, but only if the Entry of the ſaid Downing ſhall be adjudged lawful, then they find the Defendant not guilty, and if it were not lawful, then they find him guilty.

Fennor, the Eſtate of the ſaid William is conditional by the Will, to wit, that he ſhall pay to Thomas the forty Marks, according to the Will, becauſe the Will is, that the ſaid Money ſhall be paid as is aforeſaid, or before the ſaid Moneys which were to be paid, was expreſly limited to be paid upon the forfeiture of his Eſtate: And further if it ſhall not be taken for a Condition, then Thomas hath no remedy for the Money to be paid to him; and although it be limited to be paid but to Thomas, who was dead before the day of payment of it, yet it ſhall be taken as a duty limited to him which ſhall be paid to his Executors, becauſe that a time certain is limited for the payment of it, to wit, when the Land is come to the ſaid William, which is, by the death of the ſaid Alice, but if no time had been limited for the payment of it, and they had died before the payment of it, it had been otherwiſe; And it being a Condition in William, albeit it deſcend upon him, as well upon him as upon the Heir of the ſaid Thomas, yet it remains a good Condition for the part of the Heir of the ſaid Thomas, not determined by the deſcent of the other part upon the Heir of the ſaid William.

And further he ſaid, that here the Condition ſhall not be ſaid to be broken, but upon refuſal of payment by the ſaid William, as in the Caſe of George to whom it refers by the words (as is aforeſaid) which refuſal is not found, and therefore the Plaintiff ſhall be barred.

Clench, The Executors of the ſaid Thomas know not when, nor at what place to demand it, and therefore he thinks that the ſaid William ought to have rendred the Money to the ſaid Executrix at his peril.

Popham, The payment limited to be made by the ſaid George is at his firſt Entry after the death of Alice, and then to pay 40 s. and ſo yearly until 40 Marks are paid to the ſaid William, and thereupon 40 s. yearly to the ſaid Thomas, until other twenty Marks are paid to him; ſo that this is the form of the payment, to wit, at his Entry, as well for the place as the time, for it cannot be made at his Entry, unleſs upon the Land it ſelf, and therefore by the purport of the Will, the Land ſhall be taken for the place where the payment ought to be made, for avoiding the inconvenience which otherwiſe will enſue; as if I am bound to pay to you 20 l. upon your firſt coming to ſuch a place, this place ſhall be taken for the place where the payment ſhall be made. And whereas it is ſaid further in the Will, and ſo to pay yearly 40 s. until til the twenty Marks are paid to William, this payment alſo by the words (and ſo to pay yearly, &c.) ſhall be at the ſame place at the end of every year, upon the next day after the end of it, or otherwiſe there will be no certainty when it ſhall be paid, and therefore the firſt day of every year ſhall be the very day of payment, and this alſo by virtue of the ſaid words (and ſo yearly.) And at the laſt day of payment by George to William, or Thomas there ought to be paid but 26 s. 8 d. becauſe that then there remains no more to be paid of the ſums limited to be paid to them; And when the Will here hath finiſhed with George for that which he is to pay, it goes further, and if he refuſeth to pay the ſaid ſums to William and Thomas, in manner and form aforeſaid, then he wills that all the ſaid Lands ſhall remain to the ſaid William and his Heirs for ever, paying yearly, &c. and ſo there is an expreſs penalty to George if he refuſe to make payment, to wit, that he ſhall loſe the Land for default of payment made by George by the word (paying) annexed to the Eſtate which is a Condition, but he conceived that this laſt payment to be made to Thomas, is not to be made upon any penalty, nor that a Condition is to be implied in it, although Thomas hath no remedy for it, but in conſcience, becauſe it is a meer confidence put in William to pay it: And he ſaid, that he was the rather moved to be of his opinion, becauſe every one of the

precedent Limitations was with an expreſs Condition annexed to them, as to George, if he refuſe, &c. But when William is to have but an Eſtate-tail upon the determination of the Eſtate made to George, for default of Iſſue there he ſaith nothing, but that the ſaid William ſhall pay to the ſaid Thomas forty Marks, as is aforeſaid, which is but a declaration of his intent, that he put confidence in him for the payment of it, and did not bind himſelf upon condition, as in the other caſes, which he might have done by expreſs words of condition, if his intent had been ſo, as well as he did in the other caſes, if his purpoſe had been ſo; and the words, that he ſhall pay, as is aforeſaid, is to be underſtood for the place and time when it ſhall be paid, according as George ought to pay it: And it doth not ſeem to ſtand with reaſon, to expound it, for a Condition to deſtroy the Remainder limited to the ſaid Thomas; but if it ſhall be a Condition upon a relation, becauſe of the words, that he ſhall pay it, as aforeſaid mentioned, that the Payment ought to be paid to the Executor of the ſaid Thomas, albeit he died before the day of Payment, becauſe this was a ſum in groſs limited to be paid to the ſaid Thomas at a certain time. But if it ſhall be taken for a Condition in William, he thinks clearly that the ſaid William ought to have given notice to the Executrix of the ſaid Thomas before he had made his firſt Entry into the Land of the Ten. when he intended to make his Entry, ſo that the Executrix might be there at the ſame time to have made Demand of the Money, which ought to have been done, or otherwiſe there cannot be a refuſal in the ſaid William, and without his refuſal or other default in him, the Condition cannot be broken, if it had ſuch a relation as it make the payment as George ought to do it: And ſo the Executor of Thomas cannot have notice when William will make his firſt Entry into the Land, if he do not give him notice of it, and therefore if it ſhall be a Condition it had been broken on the part of William, for want of giving notice to the Executor of the time of his firſt Entry, whereby the Executor might have notice of the time to make his demand, becauſe without a demand a refuſal cannot be, and the Executor is excuſed to make demand when he had no notice of the time, and therefore the default of William in not giving notice of it ſhall be taken againſt him as ſtrongly as if he had made a refuſal to pay upon demand; for if notice had been given to the Executor, and he had demanded the Money, and William had ſaid nothing to it, but omitted to pay it, yet this ſhall be a refuſal in Law.

But of this nothing appeareth in the Verdict, whether the Executor had notice given to him or not, nor nothing mentioned in the Verdict whether any demand or refuſal was made of the Money or not, and therefore the Verdict as to theſe points is incertain to judge upon, whether it ſhall be taken to be a Condition in William: But it ſeems as the Verdict is, that Judgment ought to be given againſt the Plaintiff, for the concluſion of the Verdict is upon the Entry of the Defendant, whether this be lawful or not, and not upon the expulſion, or whether upon the other Poyety his Entry was lawful in right of the ſaid William, becauſe they were Tenants in Common.

3. IN Treſpaſs of Aſſault, Battery and Impriſonment, made ſuch a day at in the County of Cornwal, brought by againſt : The Defendant ſaith, that he was Conſtable of the ſame Town, and that the Plaintiff the ſaid day, year and place, brought an Infant not above the age of ten days in his arms, and left him upon the ground to the great diſturbance of the people there being, and that he commanded the Plaintiff to take up the ſaid Infant, and to carry it from them with him, which the Plaintiff refuſed to do, for which cauſe he quietly laid his hands upon the Plaintiff and committed him to the Stocks in the ſame Town, where he continued for ſuch a time, until he agreed to take up the Infant again, which is the ſame Aſſault, Battery and Impriſonment, of which

which the Plaintiff complains, upon which the Plaintiff demurred. Fennor was of opinion that that, which the Conſtable did, was lawful, and that it is hard that an Officer ſhall be ſo drawn in queſtion for it, for this ſhall be an utter diſcouragement to good Officers to execute their Offices as they ought to do. Popham, a Conſtable is one of the moſt ancient Officers in the Realm for the Conſervation of the Peace, and by his Office he is a Conſervator of the Peace; and if he ſees any breaking of the Peace, he may take and impriſon him until he find Surety by Obligation to keep the Peace: And if a man in fury be purpoſed to kill, maim or beat another; the Conſtable ſeeing it, may arreſt and impriſon him until his rage be paſſed, for the conſervation of the Peace. And if a Man lays an Infant which cannot help it ſelf upon a Dunghil, or openly in the Field, ſo that the Beaſts or Fouls may deſtroy it, the Conſtable ſeeing it may commit the Party ſo doing, to Priſon: for what greater breach of the Peace can there be than to put ſuch an Infant by ſuch means in danger of its life? And what diverſity is there between this caſe and the caſe in queſtion, for no body was bound by the Law to take up the Infant but he which brought it thither, and by ſuch means the Infant might periſh, the default thereof was in the Plaintiff, and therefore the Action will not lie: And thereupon it was agreed that the Plaintiff take nothing by his Writ.

Hayes *verſus* Allen.

4. TErm. Paſch. 33 Eliz. Rot. 1308. A Cui in vita was brought in the Common Pleas, by Ralph Hayes againſt William Allen, of a Meſſuage with the Appurtenances in S. Dunſtans in the Eaſt, London, in which it was ſuppoſed that the ſaid William had no Entry, but after the Demiſe which John Bradley, late Huſband to Anne Bradley, Aunt of the ſaid Ralph (whoſe Heir the ſaid Ralph was) made to Tho. Allen and Jo. Allen, and counts accordingly, and ſhews how Couſin and Heir, to wit, Son of Wil. Brother of the ſaid Anne, W. Allen traverſes the Demiſe made to the ſaid Tho and Jo. Allen, and at Niſi prius it was found, that the ſaid Jo. Bradley and Anne his Wife was ſeiſed in their Demeſn as of Fee, in right of the ſaid Anne, of a Meſſuage in S. Dunſtans aforeſaid, containing from the North to the South 18 foot, and from Eaſt to Weſt 12 foot and an half, and being ſo ſeiſed during their Marriage, by their Deed, ſealed with their Seals, enfeoffed the ſaid Tho. Allen and Jo. Allen thereof, to hold to them and their Heirs, to the uſe of the ſaid Jo. Bradley and Anne his Wife for their lives, and afterwards to the uſe of the Church-Wardens of S. Dunſtans, Lond. and of their Succeſſors for ever, to the uſe of the Poor of the ſame place, and that Livery was made accordingly, and that the ſaid Deed was inrolled in the Chancery at Weſtm. and that afterwards the ſaid Anne died, and that Jo. Bradley ſurvived her and died, and that the Right of the ſaid Meſſuage deſcended to the ſaid Ra. as Couſin and Heir of the ſaid Anne. And that Sir W. Allen Kt. was ſeiſed of a piece of Land in S. Dunſt. aforeſaid, containing 6 foot 4 inches contiguous and adjacent to the ſaid Meſſuage, late the ſaid Jo. Bradley's and Anne his Wife, in his Demeſn as of Fee; And that the ſaid Sir W. after the ſaid Feoffment, and before the Writ purchaſed, utterly drew away the ſaid Meſſuage, late the ſaid Jo. Bradley's and Anne his Wife, and erected a new Houſe upon the Land of the ſaid Sir W. and upon part of the Land upon which the other Houſe ſtood, containing from the North to the South 13 foot, and from the Eaſt to the Weſt 18 foot 10 inches, which Meſſuage ſo newly built, ſtood the day of the Writ purchaſed, and yet ſtands, &c. And if upon the whole matter the ſaid Demiſe of the ſaid Jo. Bradley and Anne be, and in Law ought to be adjudged the Demiſe of the ſaid Meſſuage, newly built upon the ſaid part of Land, where the Meſſuage of the ſaid John Bradley and Anne ſtood, then, the Jury find that the ſaid John Bradley demiſed to the ſaid Thomas and John Allen the ſaid Houſe newly erected as aforeſaid, as the Plaintiff hath alledged, and if not, then they find that he did not demiſe.

And

And upon this Verdict Judgment was given there, and an especial Writ of Habere facias ſeiſinam awarded of the ſaid Meſſuage, with the Appurtenances; viz. 18 foot of it from the North to the South, and 12 foot and an half of it from the Eaſt to the Weſt; upon which a Writ of Error being brought in the Kings Bench, it was alledged for Error by Coke Sollicitor that upon this Verdict Judgment ought to have been given for the Tenant, and not for the Demandant, for what was remaining of that which was of the Houſe, is not a Houſe, but only a piece of a Houſe, and therefore it ought to have been demanded by the name of a piece of Land, containing ſo much one way, and ſo much another; for a Houſe waſted and utterly drawn away, cannot be demanded by a Meſſuage, but by the name of a Curtilage, or ſo much Land of ſuch Contents; for a Præcipe lies of a piece of Land containing ſo many feet in length, and ſo many in breadth: And alſo Land built during the poſſeſſion of him which hath it by Moyt, cannot be demanded by the name of Land by him which hath Right, but by the name of a Houſe, nor e contra, for every demand of Land ought to be made according to the nature of which it is at the time of the Action brought, be it a Meſſuage, Land, Meadow, Paſture, Wood, &c. And if the Walls of a Houſe be made upon the Land without any covering, yet it ſhall be demanded but by the name of Land; for he ſaid, that it cannot be a Houſe without its perfection to be habitable, which he ſaid is not here, becauſe it ſtands upon the Land of the ſaid Anne, which hath not the perfection of a Houſe habitable without the Remnant. But this notwithſtanding the firſt Judgment, was affirmed; for it was ſaid by Popham, and other Juſtices, that, that which is erected upon the Land of the ſaid Anne, ſhall be ſaid a Houſe as to the right of the Heir of the ſaid Anne, for a Houſe may be ſuch to be demanded by the name of a Houſe, albeit it hath not all the perfection of a Houſe, as if it hath no Doors, ſo if it hath part of the ſide-walls not made, drawn away, or fallen, yet the remainder continues to be demanded by the name of an Houſe; ſo if part of the Covering be decayed, yet it ſhall be demanded by the name of an Houſe, and the rather here, becauſe with that which is upon the other Land it is a perfect Houſe; and I may have a perfect Houſe although the Side-walls belong to another: as in London, where a Man joyns his Houſe to the Side-walls of his Neighbours, he hath a perfect Houſe, and yet the Side-walls belong to another, and this commonly happens in London, but it is otherwiſe if it were never covered, or if the covering be utterly fallen, or drawn away, for without a Covering a Houſe cannot be ſaid to be a Houſe, for a Covering to keep a Man from the Storms and Tempeſts over head, is the principal thing belonging to a Houſe.

And further, ſuppoſe that a Man hath a Kitchin, or a Hall upon Land, to which another hath right, he which hath right ought to demand it by the name of a Houſe: ſuppoſe then that there is adjoyning to this upon other Land a Parlor, a Buttery, a Shop, a Cloſet, and the like, with Chambers over them, this doth not change the form of the Writ that he is to have which hath right, although before it was built by the name of a Houſe, and yet as to the Rent both the one and the other was but a Houſe, but as to the Demandant it is otherwiſe, for they are ſeveral, ſo here: And the Demiſe which before was made of the Houſe drawn away, ſhall be now upon the matter a Demiſe, as to this part of it a new Meſſuage; for if a Man make a Leaſe for years of a Houſe, and the Termor pull it down, and erect there a new Houſe, or if Land be demiſed, and the Leſſee build a Houſe upon it, in an Action of Waſte, for Waſte done in this new Houſe, the Writ ſhall ſuppoſe that he did waſte in the Houſes, &c. which were demiſed to him, and yet in the one caſe it is not the Meſſuage which was demiſed to him, and in the other the Houſe was not demiſed, but the Land only; But he hath no Term in the Houſe but by the Demiſe before made: And it ſeems to Popham, that Allen the Defendant cannot pull down this part of the Houſe erected upon his own Land to the prejudice

of

of the houſe which Hayes demands, if this which is erected upon the Land of Allen be of ſuch neceſſity, that without it the Houſe of Hayes cannot ſtand for a Houſe; but if he dies after that Hayes hath built it, that Hayes ſhall have an Action upon the Caſe againſt him for the damages which he ſuſtained by it: As if a Man agree with me that I ſhall ſet the outer Wall of my Houſe upon his Land, and I do it accordingly, and afterwards the Party which grants me this Licence, breaketh it down, if the Grant were by Deed I ſhall have an Action of Covenant for it, and if but by Parol, yet I ſhall have an Action upon the Caſe againſt him. And here this being done by him which was then Owner and Poſſeſſor of the one and the other Land, it ſhall be taken as a Licence in Law, to the benefit of him which hath Right, which he cannot pull down after it is once made, but he ſhall be ſubject to Hayes his Action for it, or otherwiſe Hayes ſhall be at great miſchief and prejudice by the Act of him which did the wrong, which the Law will not ſuffer, but rather ſhall turn this to the prejudice of him which did the wrong, than to the prejudice of the other which ſhall have wrong by the doing of it; for Volenti non fit injuria, As if I am to incloſe between my Neighbour and my ſelf, and my Neighbour pull down this Incloſure or part of it, whereby my Cattel eſcape into the Land adjoyning, and depaſture there, I ſhall be excuſed of this Treſpaſs in the ſame manner as if he had licenced me to have occupied it, and whatſoever happeneth to this Land adjoyning by my Neighbour's means, ſhall be in the ſame degree as my Neighbours Act, for what he does ſhall be to his own prejudice.

And upon the Judgment affirmed, the Attorney of the ſaid Hayes made the like Writ of Habere facias ſeiſinam, directed to the Sheriffs of London, as was done in the Common Pleas, whereupon it was affirmed to the Court in Hillary Term next enſuing, that the Sheriffs had made their Execution by the quantity of the ſet compriſed in the Writ, and that in the doing of it there was pulled down the part of another Houſe of the ſaid Allen which was erected two foot upon the Land of the ſaid Anne, and prayed Remedy for it, and that this Habere facias ſeiſinam varying from the thing recovered, might not be filed; To which it was ſaid, that this quantity of ſet was but a Surpluſage in the Writ, and that the Writ before this was ſufficient and warranted by the Verdict and Judgment.

Sherry *verſus* Richardſon.

5. IN Debt upon an Obligation of 50 l. by Lawrence Sherry againſt Arnold Richardſon, the Caſe was this; 16 Martii 33 Eliz. the ſaid Richardſon was bound to Sherry in 50 l. with condition to ſtand to and obſerve the Arbitrement, Award, Order, Rule, final End and Judgment of one Walter Bolton and Edward Price Arbitrators, indifferently elected to arbitrate, award, and judge of, and for all Actions, Suits, Quarrels, and Demands whatſoever betwixt them, until the date of the Obligation, ſo that it be made and done in Writing under their Hands and Seals, ready to be delivered to the Parties, at, or before the laſt day of this inſtant Month of April, and the ſaid Arbitrators the laſt day of April, 33 Eliz. made an Arbitrement in writing under their Hands and Seals, that within four days next enſuing the Award, either of the ſaid Parties ſhall releaſe each to other all Actions, Suits and Demands before the date of the ſaid Obligation, with this Proviſo, that if either of the ſaid Parties ſhall be diſcontented with the ſaid Award, or any part of it, within twenty days after the Award, that then upon the payment of 10 s. by the Party which thinks himſelf agrieved with the Award, to the other, within the twenty days the Award ſhould be void, and either of them to be at liberty againſt the other as before the Award; and by the whole Court, if the Award ſhall be ſaid made within the time compriſed in the

the Obligation, where the Proviſo had bèn to be perfoꝛmed after the four days, it had bèn gwd, and a final Award, because that the Proviſo to make the Award void after the time limited foꝛ making of Releaſes, is repugnant to that which was to be executed beforꝛe, to wit, that either of them ſhall releaſe each to other within four days; foꝛ every Award ought to be reaſonable and indifferent betwixt the Parties in all appearance, and ſo that the one part of it ought not to impugn oꝛ encounter the other, and here to what purpoſe ſhall it be to make the Award void, and to put out at liberty againſt the other, when they have made Releaſes each to other, and what indifferency oꝛ reaſon ſhould there be, that when one hath releaſed, the other may diſſolve the Arbitrement by the Proviſo, and how may the Obligation which had bèn once foꝛfeited by the not making of the Releaſe within the four days be helped and become not foꝛfeited by diſſolving of the Arbitrement by the Proviſo. But by Popham, Gawdy and Clench, if the Releaſes had bèn limited to have bèn made at a day to come, as ten days after, and that the Proviſo had bèn to have bèn perfoꝛmed in the mean time beforꝛe theſe ten days, then the Award had bèn void, becauſe they had not purſued the ſubmiſſion, foꝛ it was no final end of the Controverſie, in as much as it is not certain by reaſon of the Condition, whether it ſhall be an end oꝛ not: But it ſeems to Popham, that the Award here is not made within the time that it ought to have bèn made by the Condition, foꝛ the Obligation is alledged to be made the 16th. of March, 33 Eliz. and then no Month can be the inſtant Month but March, and therefoꝛe this woꝛd April is but a mèr Negation, and if it ſhould not be ſo, to what April ſhall it refer? foꝛ there is no matter to guide it moꝛe to one April than another, but the general Intendment which happily ſhall guide it to the next April, foꝛ avoiding of incertainty, if it had not bèn foꝛ the woꝛds (this inſtant Month) and the woꝛds (within this Month) ſhall not be ſaid to be friwolous and vain, where they may have a gwd and plain Intendment, but rather the woꝛd (April) which is repugnant to it ſhall be ſaid to be void and a mèr Negation; but it ſeems to him that as the Award is, the Caſe being that at any time within twenty days after the Award made, the one oꝛ the other diſliking the Award, might have bèn defeated upon the payment of 10 s. if the 10 s. had bèn paid within four days, as it might have bèn, and beforꝛe the Releaſes made, the Party by the intent of the Award had not bèn bound to have made the Releaſes, becauſe that by it within the time beforꝛe the Releaſes made, the Arbitrement ſhall be defeated by the Condition if it had bèn a gwd Award, and therefoꝛe it ſtall not be ſaid to be a final Award at the time of the Award made, becauſe that inſtantly upon it, beforꝛe the four days are paſſed, there was power in the ſaid Parties to have defeated the Award upon the payment of the ſaid 10 s. and therefoꝛe it ſeems to himſelf alſo that the Award was void, and by conſequence the Plaintiff ſhall be barred.

6. KIng Richard the Third, by his Letters Patents granted to the Burgeſſes of Gloceſter and to their Succeſſoꝛs, that the Town of Gloceſter &c. ſhall be a County of it ſelf, ſeveral and diſtinct from the County of Gloceſter foꝛ ever, and no part of that County, and ſhall be called the County of the Town of Gloceſter; nevertheleſs ſaving and reſerving to himſelf and his Heirs, that the Juſtices of Aſſiſe in the County of Gloceſter, the Juſtices of Goal-delivery, and of the Peace, in holding of their Seſſions, and alſo the Sheriff of the County of Gloceſter in holding of his County-Courts, and every of them may freely enter into the ſaid Town, ank kèp the ſaid Seſſions and County-Courts, of, and foꝛ any thing and matter ariſing out of the ſaid County of the Town aforeſaid, and within the ſaid County of Gloceſter, as beforꝛe time they had accuſtomed to hold them there, the ſaid Grant oꝛ any other thing notwithſtanding. And grants further, that they ſhall have a

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Major, two Sheriffs, and one Recorder, within one ſame County of the Town of Gloceſter, and that the Miniſters of the Sheriff of the County ſhall not afterwards enter to do or execute any thing there which to their Office of Sheriff appertaineth, or any ways to intermeddle with it, except only for the Sheriff of the County of Gloceſter, to hold their County-Courts as is aforeſaid: And that the Major and Aldermen of the ſaid Town for the time being, and their Succeſſors, having Power and Authority to enquire, hear and determine all things which Juſtices of Peace, or Juſtices aſſigned to hear and determine Treſpaſſes and Miſdemeanors within the County of Gloceſter before this time have made or exerciſed: And that the Juſtices of the Peace, of him, his Heirs, or Succeſſors within the ſaid County of Gloceſter, ſhould not intermeddle with the things or cauſes which belong to the Juſtices of Peace within the ſaid Town, &c. And upon this Charter divers things were moved by Sir William Periam Knight, now Chief Baron of the Exchequer; before his going into the Circuit.

1. Whether, by the ſaving of the Charter they have ſufficient power reſerved to them to ſit within the Town, being now exempted from the ſaid Town of Gloceſter; to enquire there of the Felonies done in the ſaid County of Gloceſter; And ſo for the Aſſiſes and Niſi prius taken there of things made in the County of Gloceſter. Then if the Sheriffs may execute their Warrants made there at the time of the Aſſiſes or Goal-delivery, notwithſtanding the Exemption given to them by the Patent.

And it was agreed by all the Juſtices that the ſaving in the Patent is ſufficient for the Juſtices of Aſſiſe and Goal-delivery to ſit there for the things which happen within the County of Gloceſter, for as the King may by his Letters Patents make a County, and exempt this from any other County, ſo may he in the making of it ſave and except to him and his Succeſſors ſuch part of the Juriſdiction or Privilege which the other County from which it is exempted, had in it before; As in divers places of the Realm, the Goal of a Town which is a County of it ſelf, or which is a place privileged from the County, is the Goal of the County, and the place where the Aſſiſes or Goal-delivery is holden, is within the County of the Town, and yet ſerve alſo for the County at large; as in the Seſſions-Hall at Newgate, which ſerves as well for the County of Middleſex as for London, and yet it ſtands in London, but by uſage it hath always been ſo, and nothing can be well preſcribed unto by uſage which cannot have a lawful beginning by Award or Grant, and this by the diviſion of London from Middleſex at the beginning might be ſo. And ſo the Goal of Bury, &c. And although that the words are, ſaving to him and his Heirs, yet by the word (Heirs) it ſhall be taken for a perpetual ſaving, which ſhall go to his Succeſſors, which is the Queen, and the rather becauſe it is a ſaving for Juſtice to be done to the Subjects, which ſhall be taken as large as it can be: And albeit the expreſs ſaving for the Sheriff is but for to hold his Turn, yet in as much as the Authority of the Juſtices of Aſſiſe and Goal-delivery in holding their Seſſions as before was accuſtomed, is ſaved, it is included in it, that all which appertain to the Execution of this Service, is alſo ſaved, or otherwiſe the ſaving ſhall be to little purpoſe: And therefore that the Sheriff, or other Miniſter made by the Authority of theſe Courts, is well made there and warranted by the Charter: And we ought the rather to make ſuch Expoſition of the Charter, becauſe it hath been always after the Charter ſo put in Execution by all the Juſtices of Aſſiſe: But it ſeems that by this Commiſſion for the County a thing which happens in the Town cannot be determined, albeit it be Felony committed in the Hall during the Seſſions, but by a Commiſſion for the Town it may.

Vide this Case reported in *Coke, lib.* 7. 12, 13.

SIr Francis Englefield Knight, being ſeiſed in his Demeſn as of Fee, of the Mannor of Englefield, in the County of Berks, and of divers other Lands in the firſt year of Queen Eliz. departed out of the Realm by Licence of the Queen for a time, and remained out of the Realm in the Parts beyond the Seas above the time of his Licence, whereby the Queen by her Warrant under her Privy Seal required him to return, upon which he was warned, but did not come, whereupon the Queen ſeiſed his Land for his Contempt; After which the Statute of Fugitives was made in the 13th year of the Queen, upon which by Commiſſion found upon the Statute, all his Lands were newly ſeiſed, and afterwards, 17 Eliz. by Indenture made between him and Francis Englefield his Nephew, and ſealed by the ſaid Sir Francis at Rome, the ſaid Sir Francis covenanted with his ſaid Nephew, upon conſideration of Advancement of his Nephew, and other good Conſiderations to raiſe an Uſe, that he and his Heirs and all others ſeiſed of the ſaid Mannor, &c. ſhall hereafter ſtand ſeiſed of them to the uſe of himſelf for term of his life, without Impeachment of Waſte, and afterwards to the uſe of his Nephew, and of the Heirs Males of his Body, and for default of ſuch Iſſue, to the uſe of the right Heirs and Aſſigns of the ſaid Francis the Nephew for ever, with a Proviſo, that if the ſaid Sir Francis ſhall have any Iſſue Male of his Body, that then all the ſaid Uſes and Limitations ſhall be void; and with a Proviſo further, that if the ſaid Sir Francis by himſelf or any other, ſhall at any time during his life deliver or tender to his ſaid Nephew a Ring of Gold, to the intent to make the ſaid Uſes and Limitations void, that then the ſaid Uſes and Limitations ſhall be void, and that thereafter the ſaid Mannors, &c. ſhall be as before. Afterwards the ſaid Francis was attainted of Treaſon ſuppoſed to be committed by him, 18 Eliz. A Lumures in partibus tranſmarinis, & le attainder fuit primerment utlagary, & apres per act de Par. 28 Eliz. by which the Forfeiture of the Condition was given to the Queen, and at the ſame Parliament it was alſo enacted, that all and every Perſon or Perſons, which had or claimed to have any Eſtate of Inheritance, Leaſe or Rent then not entred of Record, or certified into the Court of Exchequer, of, in, to, or out of any Mannors, Lands, &c. by or under any Grant, Aſſurance or Conveyance whatſoever, had or made at any time after the beginning of the Reign of Her Majeſty, by any Perſons attainted of any Treaſons mentioned in the ſaid Act after the 8th day of February, 18 Eliz. within two years next enſuing the laſt day of the Seſſion of the ſaid Parliament, ſhall openly ſhew in the ſaid Court of Exchequer, or cauſe to be openly ſhewn there the ſame, his, or their Grant, Conveyance or Aſſurance, and there in the Term time in open Court, the ſame ſhall offer and exhibit, or upon his or their Oath affirming that they have not the ſame, nor can come by it, or that it was never put in writing, then the Effect thereof to be entred and inrolled of Record, or elſe every ſuch Conveyance and Aſſurance ſhall be void and of none effect, to all intents and purpoſes; ſaving to every Perſon and Perſons (other than to Parties and Privies to ſuch Conveyance and ſuch as ſhall not exhibit the ſaid Conveyance according to the true meaning of this Act) all ſuch Rights, &c. whereupon the ſaid Francis the Nephew, the 20th day of Novem. 30 Eliz. in his own Perſon affirmed upon his Oath that he had not the ſaid Conveyance, nor knew not how to come by it, but delivered the Effect of the Aſſurance, omitting the time when it was made, otherwiſe than that it was made after the beginning of the Queens Reign, and before the Treaſon committed by the ſaid Sir Francis, and before the Statute made 13 Eliz. againſt Fugitives, and omitting alſo the laſt clauſe of the Condition for the tender of the ſaid Ring; and this he offered openly in the Court of Exchequer the ſame day: after which the Queen being moved with the ſaid Condition, made a Warrant per Letters Patents under the great Seal, dated 17 Martii 31 Eliz. to Richard Broughton

and

and Henry Bourchier Eſquires, for her and in her place and ſtead, to deliver or tender to the ſaid Francis the Nephew a Ring of Gold, to the intent to make void the Uſes and Limitations limited by the ſaid Indenture, and to return their Proceedings upon it unto the Court of Exchequer, whereupon they made a tender of a Ring of Gold to the ſaid Francis the Nephew, the 18th day of March, 31 Eliz. which he refuſed to receive; And the two years after the ſaid Seſſion of Parliament was the 23d day of March, 31 Eliz. And the ſaid Broughton and Bourchier returned all this that they had done as before, with the Commiſſions into the Exchequer, according to the Commiſſion: And upon this at the Parliament holden 35 Eliz. upon an Act which then was to paſs touching the Land and Attainder of the ſaid Sir Francis, divers Queſtions were moved amongſt all the Judges and Barons then there; whereof,

1. The firſt was, whether the effect of the Aſſurance made by Sir Francis was delivered into the Exchequer according to the intent of the Act, becauſe it wanted the time when it was made, and alſo one of the Proviſo's? And upon good deliberation they all did agree that it was not put in according to the purport of the ſaid Act, for the time may be material to be known, for the fraud which by the ſame Statute might be averred to be in the making of this Conveyance, and for the better tryal of the validity of the Aſſurance and of the cauſe of it; therefore the true effect thereof ought to be delivered or ſhewn in Writing to be entred of Record, becauſe the Queens Council may ſee and underſtand by it whether the Queen might have Title to it, or not; and how can this be if it doth not appear when it was done? And for the Condition how can the Queen by preſumption come to the notice of it, if it be not ſhewn to her? And this was one principal matter of the effect of the ſaid aſſurance which ought to have been ſhewn, for this ſhewing ought to be for the benefit and advantage of the Queen, and not ſo much for the advantage of the Party. And here the effect of it which ſhall ſhew for the Queen is omitted, and therefore not ſhewn in writing according to the purport and intent of the Statute, which was, that by it the Queen and her Council may ſee what will make for her in the Grant, Conveyance or Aſſurance.

2. Whether this Condition were given to the Queen, becauſe that the words in the Indenture precedent to the Condition, are theſe; viz. Becauſe that the ſaid Francis the Nephew might happen to be of evil Behaviour and Government; the ſaid Sir Francis provided as before, which (as was alledged) was founded upon a particular regard and reſpect, which was proper to himſelf, and therefore cannot be transferred to the Queen; and it doth not appear that he yet had been of ill behaviour: But this notwithſtanding, all agreed that this Condition is in the Queen by the Attainder of the ſaid Sir Francis, as well by the Act of his Attainder, as by the Act of 33 H. 8. which give the forfeiture of Conditions alſo expreſly in the caſe of Treaſon.

3. Whether there ought to be an Office for finding the performance of the Condition according to the Warrant, and all agreed that there need not, becauſe that when any Man is to do a thing by Warrant of Letters Patents for the Queen, to be returned in any Court, it ſufficeth for him to return it, which he hath done according to the Letters Patents, with the Warrant it ſelf, and then that which is ſo returned, is as well of Record as if it were found by Office and returned of Record; and ſo it was agreed in the Exchequer, about 16 Eliz. in the Caſe of Edward Dacres, who had made an Alligument of his Goods and Chattels to Sir Alexander Culpepper and others, who afterwards was attainted of Treaſon by Outlawry, and the Condition adjudged to be forfeited to the Queen by the Statute of 33 H. 8. and a Warrant was made by Letters Patents to Sir Thomas George to perform the Condition, who did it, and returned that he had done it accordingly, whereby the Aſſurance to the ſaid Sir Alexander and his Companions was avoided, and all the Goods and Chattels of the ſaid Edward forfeited to

the Queen, and all this was in the Queen without Office found, for that which the Sheriff or other Minister doth by virtue of any Writ or Warrant which is to be of Record, when it is returned of Record, it is as well of Record as the Writ or Warrant it self, &c. here, &c.

4. But the greatest question was (which was not any thing in the case here) whether the Estate made to Francis the Nephew were void, eo instanti upon Hillary Term finished 31 Eliz. although the two years after the Session of Parliament, 28 Eliz. did not end until the 28th day of March, 31 Eliz. in as much as no Term was or could be within two years after it, in which the assurance or the effect of it might be shewn openly in the Court of Exchequer, or that it shall tarry to be void until the two years are fully expired; as if a Man make Assurance of his Land upon condition, that if he do not go to Rome within two years next ensuing, that it shall be to the use of I. S. and his Heirs, and he lay watch within the end of the two years, in so much as it is not possible to perform it within the two years, yet the use doth not change until the two years are past; but in this case it ought to be shewn a Term within the two years, which is as much as to say, that if the Terms be all past, in as it cannot be done after it within the two years, the Assurance eo instanti upon the finishing of the last Term is become void; as if an Assurance be upon condition, that if in the Term time, within two years he do not levy a Fine to I. S. and his Heirs, &c. now if the last Term pass without the Fine, the Use change, albeit the two years be not expired; if Parolls sont Plea: And there is great diversity where an Estate is to be defeated, or an Use is to be raised upon an Act to be done, or not done, within a time certain, within two years, and where within two years generally, for in the first case the Use change upon the Act done, or not done immediately, and in the other not until the two years are finished, because that by presumption always within two years the Act may be done for any thing of which the Law takes conusance. But if the Act to be done, or not done, refer to any time certain within the two years, as if he do not pay xl. to one before the Feast of S. Michael the Arch-angel within the two years, that then the Use shall change, or the Estate shall be void, in these cases immediately upon the last Feast of S. Michael the Arch-Angel, within the two years the Use change, or the Estate shall be void, as the case is, and shall not tarry until the full end of the two years to do it, for in the words themselves the diversity appeareth.

8. At the same time there was another Indenture sealed to the said Juges, bearing date the 4th day of May, 1 Eliz. made between the said Sir Francis Englefield of the one part: And Sir Edward Fitton, and Sir Ralph Egerton Knights, of the other part, and Counsellors in the Exchequer, according to the Statute, of the 30th day of October, 30 Eliz. by which the said Francis for him and his Heirs covenanted with them, that as well in consideration of a Marriage had and solemnized between John Englefield, Brother of the said Sir Francis and Margaret Fitton, Sister to the said Sir Edward, and for the augmentation and Interest of the Joynture of the said Margaret, as for other good causes and reasonable considerations, the said Sir Francis especially moving, the said Sir Francis before the Feast of St. John Baptist, then next ensuing, would assure Lands within the County of Warwick, of the value of 60 l. a year to the said Sir Edward and Sir Ralph, and their Heirs, to the use of the said Margaret for her life, and for her Joynture, for part of it, and for the Remainder that it shall also be to the use of the said Margaret for her life, in case that the Lady Anne then the Wife of the said Sir Francis, should recover her Dower of the said 60 l. a year.

And the said Sir Francis for him and his Heirs, did further covenant with the said Sir Edward and Sir Ralph, that if it should happen that the said Sir Francis

Francis ſhall die without Iſſue Male of his Body, the ſaid John or any Iſſue of his Body upon the Body of the ſaid Margaret begotten then living, that then after the death of the ſaid Sir Francis, as well the Manor of Engleſield, as all his other Lands (making eſpecial mention of them) ſhould be and might diſcend, remain, revert, continue or be in poſſeſſion or reverſion to the ſaid John Engleſield, and to the Heirs Males of his Body upon the Body of the ſaid Margaret lawfully begotten, if the ſaid John were then living, or to the Heirs Males of the Body of the ſaid John upon the Body of the ſaid Margaret lawfully begotten, without any Act or Acts, Thing or Things made, or to be made to the ſaid Sir Francis to the contrary thereof.

And upon this, it was moved, that there was a variance between this Deed now ſhewn, and this Enrolment, and that therefore it doth not appear, whether this Deed was ſhewn in the Court or delivered there according to the Statute therof made, 28 Eliz. for in the Deed it is (for other good cauſes) and this word (good) is not compriſed within the Inrolment.

But as to it, all the Judges and Barons agreed, that albeit theſe defects happen by the negligence of the Clerk in writing and examining, this Inrolment remains good, in as much as the omiſſions are in matters and words which are of abundance, and not in that which is any ſubſtance of the Deed.

But the Lords of Parliament which were Committees of this Caſe in the Parliament, ſent for the Record of the ſaid Inrolment, and would have had this to have been amended in the Chamber next to the Parliament; but as the Officer was in doing of it, the Judges adviſed that it ſhould not be done, as well becauſe this was not the place where it ought to be amended, but the Court of Exchequer if it were, or needed to be amended: And alſo becauſe that the two years after the Seſſion of Parliament of 28 Eliz. was then paſt.

Then it was moved whether by the Covenant and Conſiderations aforeſaid, the Iſſe ſhall paſs or were raiſed to John Engleſield, or now to his Son Francis, Nephew to the ſaid Sir Francis, and begotten upon the Body of the ſaid Margaret. And all agreed that it is not for divers reaſons.

1. Becauſe it is, that if it happen that Sir Francis die without Iſſue Male, that then it ſhall be to John as before, if he be then living, or to the Heirs Males of his Body as before, which is in the diſjunctive, to wit, that it ſhall remain to John, as to his Heirs Males of his Body, which cannot raiſe any Iſſe, but ſound only in Covenant for the Inheritance, and alſo it is upon a future Contingent, to wit, if the ſaid John be then living.

2. Becauſe the Covenant is, that it ſhall come or deſcend, &c. in the diſjunctive, and if he had covenanted that it ſhall deſcend to John after his death without Iſſue Male, it had been clear that no Iſſe had been raiſed by it, for it ſhall be but a meer Covenant, to wit, that he ſhall leave it to deſcend to him; and here it being in the diſjunctive it cannot be any other than a bare Covenant, to wit, that he ſhall ſuffer it to deſcend, or otherwiſe by Conveyance to come to John, after his death without Iſſue Male, the one, or the other at his pleaſure.

And yet further, that it ſhall deſcend, come or remain to John in Poſſeſſion or Reverſion, ſo that he may make the one or the other void at his pleaſure, which cannot be, if an Iſſe ſhall be raiſed by it, and therefore alſo it enures but as a bare Covenant, which he may perform either the one or the other way at his pleaſure.

Alſo it is, that it ſhould deſcend or come to John without any act or thing done or to be done by him to the contrary, whereby alſo it fully appeareth, that the Aſſurance of the ſaid John ſhall ſtand for all this Land upon the Covenant, and not upon any Iſſe, which was to be altered and changed by it.

But

But if an Uſe may change by the Pannor upon the conſideration, yet it ſhall not change to the ſaid John or his Iſſues, until the death of the ſaid Sir Francis without Iſſue Male, becauſe that until that happen, if the ſaid John had been living, he had not had any Uſe, becauſe it is that he ſhall have the Land then if he be then living, and if it ſhall not be in him until this time, it ſhall not be in his Son until Sir Francis be dead without Iſſue; for it is if the ſaid John or any Iſſue Male of his Body, &c. be then living, then it ſhall deſcend, come or remain, &c. ſo that it doth not come to them until it may appear whether the ſaid John, or any Iſſue Male of his Body upon the Body of the ſaid Margaret, be in rerum natura, when Sir Francis ſhall be dead without Iſſue Male, and therefore it yet remains upon a Contingent, whether the Uſe ſhall be to the Heirs Males of the Body of the ſaid John, if it ſhall be ſaid that it is an Uſe, and therefore in the mean time the entire Fee-ſimple remains in Sir Francis, not yet changed, but for the Eſtate Tail it ſelf in himſelf, if any change ſhall be, as appeareth before that it ſhall not be, and therefore by the Attainder of the ſaid Sir Francis, the whole Fee-ſimple is now all forfeited to the Queen, before that the Uſe may be to the Heirs Males of the Body of the ſaid John: And the Queen ſhall not come to this Land in any Privity by the ſaid Sir Francis, but in the Poſt by the Eſcheat, and therefore the Poſſeſſion of the Queen now, or of her Patentee ſhall never be changed with this Uſe, which ſhall never be carried out of any other Poſſeſſion but ſuch which remaineth in Privity until the Uſe is to come in Eſſe, no more now than as it might at Common Law before the Statute of Uſes, 27 H. 8. And this as to the future Uſe was the opinion of Popham, and ſome other of the Juſtices. And note 21 H. 7. placito 30. If a Man covenant in conſideration of the Marriage of his Son, that immediately after his death his Land ſhall revert, remain or deſcend to his Son, to him and the Heirs of his Body, or to him and his Heirs for ever, that this is but a bare Covenant, and doth not change any Uſe, And what diverſity then is there in the Caſe of Sir Francis Engleſield, who covenants that it ſhall deſcend or remain in Poſſeſſion, or Revert. And as it ſeems the great difficulty which was in the Caſe of Sir Robert Conſtable, which was put by Gerard Attorney-general, 6 Eliz. and it appeareth in Dyer, 1 Mar. was becauſe that the Covenant was, that it ſhall be to the Son in Poſſeſſion or Uſe, which for the uncertainty in as much as it was in them to leave the one or the other, or perhaps the Eſtate of their Land was ſuch, that part was in Poſſeſſion and part in Uſe, and therefore according to the intent taken rather for a Covenant than for matter ſufficient to change the Uſe: But it was ſo that it was never helped by any Right which he had, but by the Grace of the Queen he enjoyed it.

Eaſter Term, 35 Eliz.

Crocker *and* York *verſus* Dormer.

1. UPon a Recovery had by John Crocker and George York, againſt Geoffrey Dormer, in a Writ of Entry in the Poſt, of the Manor of Farningho, with the Appurtenances, and of ſix Meſſuages, ſix Tofts, &c. in Farningho, and of a yearly Rent or Penſion of four Marks iſſuing out of the Church or Rectory of Farningho, and of the Advowſon of the Church of Farningho, in the County of Northampton, William Dormer Son and Heir of the ſaid Geffrey, brought a Writ of Error, and aſſigned divers Errors.

1. Becauſe that ſuch a form of Writ doth not lye of an Advowſon, but only a Right of Advowſon, Darrien preſentment and Quare impedit.

2. Becauſe he demands the Advowſon of the Rectory, and alſo a Rent iſſuing out of the ſame Rectory.

3. Be-

3. Becauſe the Demand for the Rent is in the Diſjunctive, to wit, a Rent or a Penſion.

4. Becauſe it is a Penſion, whereas a Penſion is not ſueable in our Law, but in the Spiritual Court; to which Gawdy ſaid, that there is a great diverſity between a common Recovery, which is an Aſſurance between Parties and a Recovery which is upon Title; for a common Recovery is to an Uſe, to wit, to the uſe of him againſt whom it is had, if no other Uſe can be averred, and therefore as to the Uſe, it is to be guided according to the intent of the Parties, and by a common Recovery had againſt Tenant for life, he in the Reverſion if he be not party or privy to it, may enter for a Forfeiture, as it was adjudged very lately in the Exchequer, by the Advice of all the Juſtices in the caſe of a Recovery had againſt Sir William Petham Knight, and in all theſe things it is otherwiſe in caſe of a Recovery upon Title, and therefore in as much as this common Recovery is but a common Aſſurance between Parties, and is always by Aſſent between Parties, to the end that they may make Aſſurance from one to another, there ſhall be and always hath been a contrary Expoſition to a Recovery which is by pretence of Title, and it hath been common to put in ſuch Recoveries, Advowſons, Commons, Warrens, and the like, and yet always allowed: And if this ſhall be now drawn in queſtion, infinite Aſſurances ſhall by this be endangered, which the Law will not ſuffer, and therefore the demand of an Advowſon and Penſion in the Writ of Entry makes not the Writ vitious, as it ſhall do in another Writ of Entry founded upon a Title and not upon an Aſſurance. And as to that, that the Rent and the Advowſon alſo is demanded, this is good, becauſe the Advowſon is another thing than the Rectory it ſelf, out of which the Rent is demanded to be iſſuing: And for the diſjunctive demand of the Rent or Penſion, it makes no matter in this Caſe, becauſe it is a common Recovery in which ſuch a preciſe form is not neceſſary to be uſed as in other Writs, and alſo a Penſion iſſuing out of a Rectory is the ſame with the Rent: To which Clench and Fennor agreed in all; but Popham moved that the greateſt difficulty in this caſe is the Demand made in the Diſjunctive, to wit, of the Annual Rent or Penſion, for if a Penſion iſſuing out of a Rectory ſhall be ſaid to be a thing meerly ſpiritual, and not to be demanded by our Law, or meerly of another nature than the Rent it ſelf, with which it is conjoyned by the word (or) then it is erroneous; for albeit a common Recovery, be now a common Aſſurance of Land paſt by the Aſſent of Parties, and therefore hath another Conſervation, than that which paſſeth by pretence of Title, yet we are not to omit groſs Abſurditis in ſuch common Recoveries, as to demand an Acre of Land or Wood in the Manor of Sale, or Dale, or Black-acre, or White-acre, theſe are not good in common Recoveries, becauſe there is no certainty in the demand which of them the Party is to recover, which kind of Abſurdity is not to be admitted in theſe Recoveries; for this is but a meer ignorance in the Law and the Miniſters of it. And to this Gawdy and the other Juſtices agreed, but they ſaid, that a Penſion iſſuing and a Rent ſhall be taken for all one; for if a Man grant a Penſion of 20 s. a year, iſſuing out of the Manor of D. or of the Rectory of S. theſe are Rents iſſuing out of them: and if the Demand had been of an Annual Rent, or Annuity of 20 s. a year iſſuing out of the Rectory, this had been good. To which Popham agreed, and yet ſaid, if it had been an Annual Rent of 20 s. &c. or of an Annuity of 20 s. it had not been good, becauſe that the word (iſſuing) is not referred to the Annuity, but to the Rent only, and therefore are meerly general, and not as the ſame, but if the Demand were of an Annuity, Rent, or Payment of 20 s. iſſuing out of a Rectory, it is good, for this is but one and the ſame. Then it was alledged that notwithſtanding that which appears to the Court, it cannot be taken that this was a common Recovery, for upon the Alligument of the Error, it is not averred that it was a common Recovery

very, to which Popham ſaid, that common Recoveries are ſuch common Aſſurances to all Perſons that are well known to all, and eſpecially to us that they need not be averred, for they are known by certain Marks, to wit, by the voluntary Entry into the Warranty, the common Voucher and the like: And at laſt they all agreed that the Judgment ſhall be affirmed.

2. In Waſte, by Thomas Haydock againſt Richard Warnford, the Caſe was this; One Michael Dennis was ſeiſed in his Demeſn as of Fee, of the third part of a Meſſuage, and of certain Lands in Bury Blunſden in the County of Wilts, and being ſo ſeiſed the laſt of April, 9 Eliz. demiſed them to Suſan Warnford for forty one years, from the Feaſt of S. Michael the Arch-Angel then next enſuing, who aſſigned this over to Richard Warnford, after which the ſaid Michael Dennis by Bargain and Sale enrolled, according to the Statute, conveyed the Reverſion to John Simborn Eſquire, and his Heirs, the ſaid John being then ſeiſed of another third part thereof in his Demeſn as of Fee, after which, to wit, the firſt day of June, 17 Eliz. the ſaid John Simborn demiſed the ſaid third part, which was his before his ſaid Purchaſe to the ſaid Richard Warnford for twenty one years then next enſuing, and afterwards the ſaid John Simborn died ſeiſed of the Reverſion of the ſaid two parts, and this deſcended to Barnaby Simborn his Son and next Heir, who the 20th of June, 28 Eliz. by Bargain and Sale enrolled, according to the Statute, conveyed the Reverſion of the ſaid two parts to the ſaid Thomas Haydock and his Heirs, after which the ſaid Richard Warnford committed Waſte in the ſaid Houſe, whereupon the ſaid Thomas Haydock brought an Action of Waſte againſt him, according to the ſaid two ſeveral Leaſes, and aſſigned the Waſte in ſuffering the Hall of price of 20 l. a Kitchin of price of 20 l. and ſo of other things to be uncovered, whereby the great Timber of them became rotten, and ſo became ruinous, to the diſinheriſon of the Plaintiff, and upon a Nihil Dicit, a Writ was awarded to enquire of Damages, in which it was compriſed that the Sheriff ſhall go to the place waſted, and there enquire of the ſaid Damages, who returned an Inquiſition taken thereof at Bury Blunſden, without making mention that he went to the place waſted, and that it was taken there, whereupon Judgment was given in the Common Bench, that the ſaid Plaintiff ſhall recover his Seiſin againſt the Defendant of the ſaid places waſted, with their Appurtenances Per viſum Jurator. Inquiſitionis prædict. & damna ſua occaſione vaſti in eiſdem locis in triplo ſecundum formam ſtatuti, &c. And upon this a Writ of Error was brought in the King's Bench, and there by all the Juſtices it was agreed that it was but Surpluſage to comprehend the Writ of Enquiry of Damages, that the Sheriff ſhall go to the place waſted, and there enquire of the Damages, in as much as by the not denying thereof the Waſte is acknowledged, and therefore he need not go to the place waſted: But where a Writ is awarded to enquire of the Waſte upon Default made at the Grand Diſtreſs, there by the Statute of Weſt. 2. cap. 24. the Sheriff ought to go in Perſon to the place waſted, and enquire of the Waſte done, and therefore in that Caſe it is needful to have the Clauſe in it, that the Sheriff ſhall go to the place waſted, and there enquire of it: for by the view the Waſte may be the better known to them, but where the Waſte is acknowledged, as here, that Clauſe need not, and albeit it be comprehended in the Writ, yet the Sheriff is not thereby bound to go to the place waſted, and to enquire there, but he may do it at any place within his Bayliwick where he will, and therefore it is no Error in this point: And they agreed alſo that the Waſte is well aſſigned in the entire Hall, &c. although the Action were brought but upon the Demiſes of two third parts of it, and it cannot be done in theſe parts, but that it is done in the whole, and alſo it cannot be done in the whole, but that it is alſo done in the three parts, but yet the doing thereof is not to the Diſinheritance of the Plaintiff, but in theſe two third parts; and therefore no Error in this manner of aſſigning of

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the Waſte. And they alſo agréed that the Action is well brought upon theſe ſeveral Demiſes, becauſe neither the Intereſt of the Term, nor of the Inheritance was ſevered nor divided to ſeveral Perſons at the time of the doing of the Waſte, but the two Terms in the one, to wit, in Warnford, and the Inheritance of theſe immediately in the other, to wit, in Haydock; And by Popham alſo, the thing in which the Waſte is aſſigned, is one and the ſame thing, and not divers, to wit, a Meſſuage, and therefore by Brudnell and Pollard, 14 H. 8. 10. if ſeveral Demiſes are made of one and the ſame Meſſuage by one and the ſame Perſon, as one part at one time, and another part at another, an Action of Waſte may well lie: Albeit Fitzherbert and Brook ſéem therein to be of a contrary Opinion, and that ſeveral Actions of Waſte ought to be in that Caſe.

And the Exception was taken, becauſe the Judgment was entred that he ſhall recover the place waſted, Per viſum Jurator. prædict. whereas they had not the view of it in this Caſe, for this ſhould be where it is given upon a Writ awarded to enquire of the Waſte upon default made at the grand Diſtreſs; whereas here the Waſte is not denied but acknowledged.

But as to this ſeveral Precedents were ſhewn, the one upon Demurrer for part, Hill. 1 Mariæ, Rot. 301. and another, Trin. 31 H. 8. Rot. 142. in an Information, in both which Caſes the Judgment was entred as here, to wit, Per viſum Jur. prædict. and yet in theſe, the Waſte was acknowledged: Whereupon it was ordered that the Judgment ſhould be affirmed.

3. In an Ejectione firmæ brought by Sir Moyle Finch Knight, Plaintiff, againſt John Riſley Defendant, for a Meſſuage and a Mill in Raveſton in the County of Buckinghamſhire, the Caſe for the matter in Law appeared ſhortly to be this.

The King and Quéen Philip and Mary by their Letters Patents, dated the eighth of July, 3. & 4. of their Reign, made a Leaſe of the Reverſion of the Mannor of Raveſton (of which this was parcel) to Sir Robert Throgmorton for ſeventy years, from ſuch a Feaſt, after the death of the Counteſs of Ormond, who then had it for her life, rendring yearly 73 l. 13 s. payable at the Feaſts of Saint Michael the Arch-Angel, and the Annunciation of our Lady, at the Receipt of the Exchequer by equal Portions, with a Proviſo that the Leaſe ſhall ceaſe, if the ſaid Rent or any part thereof were arrear, and not paid at the ſaid Feaſt, or a certain time after, the Reverſion deſcend to the now Quéen, and the ſaid Counteſs died 7 Eliz. part of the Rent then payable, was not paid at the day, nor within the time limited by the Proviſo, afterwards Quéen Elizabeth by her Letters Patents, dated 30 May, 30 Eliz. granted the ſaid Mannor to the ſaid Sir Moyle, and one Awdeley and their Heirs in Fee, with a Clauſe in it, that the Letters Patents ſhall be good, notwithſtanding there be not any Recital of any Leaſes or Grants at any time before that made by her, or any of her Progenitors; after which an Office is found for the Queen, that the Rent was arrear and not paid as before, after which the ſaid Sir Moyl and Awdeley aſſured the ſaid Mannors by Bargain and Sale to Sir Thomas Hennage who demiſed the ſaid Meſſuage and Mill to the ſaid Sir Moyl, upon whom the ſaid Riſley entred in Right of the ſaid Leaſe made by the ſaid King Philip and Queen Mary, under Thomas Throgmorton, who then pretended to have the Term of the ſaid Leaſe from Sir Robert his Father. The Caſe was well argued at the Bar, and now at the Bench, where Fennor moved firſt, Whether it were a Condition. 2. Whether an Office were requiſite. 3. Whether this Office found, comes ſoon enough for time: For the firſt he conceived that it was a Conditional Limitation, for a Limitation is that which limits an Eſtate certain or doubtful, as Quamdiu in manibus noſtris fore contigerit, quamdiu amicus ſit, or dummodo ſolverit: And there (dummodo)

was a Condition as appeareth, 5 Aſſ. plit. 9. & 2 Aſſ. a Grant made to J. S. and his Heirs tam diu, as the Grantor and his Heirs ſhall enjoy ſuch a Manor, this is a Limitation, and a Limitation always determines the Eſtate, but a Condition, albeit it be broken during the Eſtate, yet it doth not determine the Eſtate, and ſo it is of a conditional Limitation, and therefore it is not in the King until an Office be thereof found, for the King ſubmits himſelf to the Law, for Bracton ſaith, Quod non debet judicare ſed ſecundum legem, and his Prerogative is ſo excellent, that he cannot take a part with any thing, but by matter of Record, neither can he draw the Right or Poſſeſſion of any one in queſtion upon a bare ſurmiſe, but by Office or other matter of Record, for a Record always carries Credit with it. And there is no diverſity where two matters are limited in Deed, and where one is limited in a Deed, and the other by the Law: And the contrary Objections are eaſily anſwered, for when the Tenant in Tail of the King dies without Iſſue, it is in the King without Office, becauſe the Law does not help them which contemn it. But in caſe of an Office which is forfeited, it is in the King to diſpoſe without Office, becauſe the King is not to have the Office it ſelf but the Diſpoſition of it, and yet it is to be defeated by Scire facias in the Chancery.

If a Will be demiſed for life, upon condition that he ſhall not let it but to a Miller, and he breaks the Condition, in Caſe of the King there muſt be an Office to avoid it, and there the Office entitles the King to the Condition and not to the Entry, for after the Office it is not in the King until Entry: And here the Rent may be paid to the King's Bayliff in the Country, which is matter in fait, and therefore ſhall not be defeated without Office; And here the Office comes too late to give any advantage to the Patentee, for the King cannot grant a Title of Entry before Office, no more than the Aſſignee of a common Perſon can take advantage of a Condition broken in the time of the Grantor, of which the Grantor did not take advantage in his time; And if the Queen makes a Leaſe durante beneplacito, the Patentee ſhall not avoid it, as it appears in the Lord Burleigh's Caſe, and therefore the Office here ſhall not help the Patentee, but the Queen for the mean Profits: for although nullum tempus occurrit Regi, yet the Patentee ſhall not take advantage of this Prerogative.

Clench agreed clearly, that it was a Limitation, but yet that it is at the Queens liberty to avoid or make it good, for perhaps the Rent is better than the value of the Land, and upon this reaſon a Leaſe from the King probis hominibus de Dale, or to a Monk rendring Rent, is good, which otherwiſe had been meerly void: And by the Office found, the Election of the Queen appeareth, without which the Leaſe is to continue, and therefore the Patentee ſhall not defeat that which happened in the Queens time before.

Popham, To ſay that the Office helps the Queen for the mean Profits, and that now the Patentee ſhall not take advantage to avoid the Leaſe is too abſurd; for the Queen cannot take advantage to have the mean Profits, but in reſpect of the Avoidance of the Leaſe: And if the Leaſe were made void or determined againſt the Queen, it ſhall not remain good and of force againſt the Patentee, and alſo to ſay, that the Leaſe might have its continuance, after that it is determined by the Limitation comprehended in the Writing, by reaſon of a Reſervation, is alſo too abſurd, for ſo it may be ſaid, that if the Queen make a Leaſe for years, if J. S. ſhall live ſo long rendring Rent, that this Leaſe may have Continuance after the death of J. S. which clearly is not Law; and the Patentee here ſhall take the advantage to avoid the Leaſe happened before his Patent made, becauſe that no Office need to be found of the not Payment before it paſſed from the Queen to make it void, and the reaſon is, becauſe this Proviſo (as it is penned) is a meer Limitation of the Eſtate, and not any manner of Condition; and therefore if the Queen

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make a Leaſe for an hundred years, if the Leſſee ſhall ſo long lawfully pay the Rent reſerved at the day of Payment, if he fail of Payment of the Rent reſerved at the day limited, the Leaſe is ipſo facto determined, and it need not be found by Office. And what diverſity is there where the Limitation is conjoyned to the Eſtate it ſelf, and where it cometh in by a Proviſo afterwards, all being in one and the ſame Deed, and therefore ſpoken at one and the ſame time, for the one and the other Caſe manifeſteth that the Contract and Agreement is, that the Leaſe ſhall not continue longer than the Default of the Payment of the Rent.

And in this caſe, ſuppoſe that the Queen had granted over the Land: ſhall not the Patentee have advantage to avoid the Leaſe, becauſe that one Office was found before? It is clear that he ſhall, or otherwiſe this is now become to be an abſolute Leaſe for an hundred years, which is not Law, for it is meerly contrary to the Contract, and therefore abſurd to be maintained: I agree with the general Rule that nothing ſhall paſs to, or from the Queen but by matter of Record, but this makes nothing againſt me in this Caſe, for here the ſame Record which paſſeth the Eſtate to the Party, to wit, the Patent of the Leaſe contains the time how long it ſhall endure, longer than which it cannot continue: And therefore by 9 H. 7. If the King makes a Gift in Tail, and the Donee dies without Iſſue, the Land is in the King without Office, ſo in every other Caſe where the Eſtate is determined according to the Limitation, for he cannot be put out of Poſſeſſion wrongfully, and now hath right to hold it againſt him. And I ſay that no Warrant or Authority can be found throughout the whole Law where a Leaſe or Eſtate made by the King is determined by an expreſs Limitation compriſed in the Patent it ſelf of the Grant, that there need not any Office or other thing to determine it, for that which is compriſed in the ſame Patent may determine it, of it ſelf.

And further, whereas the Proviſo is, that the Re-entry ſhall be for Default of Payment of the Rent, and the like, there the Term continues until the Re-entry be made, notwithſtanding the Condition be broken, as appeareth by all the Juſtices, 28 H. 8. becauſe it is expreſly limited that it ſhall be defeated by the Re-entry, and there before Re-entry be made, the Action of Waſte ſhall be, quod tenet: And by 12 H. 7. where a common Perſon is put to his Entry, there the Queen is put to an Office, with which agrees Stamford in his Book of Prerogative: But in this Caſe, if it were between common Perſons, the Leaſe ſhall be determined upon Default of Payment of the Rent, and before any Re-entry, and therefore in the Queens Caſe it ſhall be determined without Office. But if the Caſe had been, that if the Rent had been Arrear and not paid, that then upon Re-entry made, it ought to ceaſe, there an Office had been neceſſary to countervail the Entry in Caſe of the Queen, or otherwiſe the Leaſe ſhall not ceaſe, becauſe the Queen cannot make an Entry but by ſuch means, and therefore it ought to be by matter compriſed in the Patent. It hath been ſaid, that this ſhall be a conditional Limitation, and that therefore an Office is neceſſary; But I ſay, that here is not any matter or quality of a Condition, but meerly of a Limitation, and it is rather a contingent Limitation than any manner of Condition, and this is well proved by 11 H. 7. which is, that the Grantee of a Reverſion ſhall take advantage of it at common Law, the which he cannot do if it ſavour any way of a Condition, and by 27 H. 8. a Proviſo in a Deed ought always to be expounded according to the purport, becauſe that it is placed in a Deed, ſometimes for a Condition, as where a Proviſo is that the Leſſee ſhall not alien; ſometimes for an Exception, as where a Proviſo is, that the Leaſe ſhall not extend to ſuch an Acre, or ſuch a thing, ſometimes for a Limitation, as here and in the like Caſes. And in this Caſe the Releaſe of the Rent ſhall make it, that the Leaſe ſhall never be determined for the not Payment of it, becauſe that afterwards there cannot be any ſuch Default of Payment, and therefore in ſuch a Caſe the Limitation re-

maineth absolute and discharged of the Contingent, which otherwise had determined it: As if a Man make a Lease for an hundred years, if the Lessee in the mean time do not cut such a Tree, a Release of all Conditions will not serve, yet if the Lessor himself or any other but the Lessee cut it, the Lease is become absolute for an hundred years: And so upon this point my conceit appeareth But the most colourable thing which hath been alledged on the other side, was by my Brother Drew, which was, that in counting upon an Ejectione firmæ, and pleading in such a Lease as here, it shall be as an absolute Lease for the years comprised in the Habendum, without making any mention of the Proviso, upon which he enforced it that it shall be taken to be of more efficacy than if it stood meerly upon the Contingent, for he said, that upon a Lease made for years, if the Lessee shall so long live, and the like, in the Count, and also in the pleading mention ought to be made of the life of the Lessee: I agree it to be true that the pleading shall be so, for in Count counting, and in Plea pleading, if the matter of the Contingent precede the Limitation, or be annexed to the Limitation, there a Man ought to speak to the Contingent, or otherwise it is not good, as by 14 H. 8. it shall be of a Condition where it is precedent; But in case of a Condition it is quite otherwise, for if a Man make a Lease to another for years, Si tamdiu vixerit, or Dummodo solverit, &c. or the like, which are annexed to the Limitation of the Estate; in all these Cases in Counting and also in Pleading, he ought to aver the life of the Lessee, or otherwise the Contents of the thing according to the Limitation; But where that which was the Limitation cometh by a Proviso, after the Habendum which distinguisheth the Sentence as here, there, because it is a matter distinct and subsequent from the Habendum, and not annexed to it, he need not to speak of it, but there it shall always come in to be shewn of the other part, and this is the usual and common Case of difference for pleading, but this makes no difference of the Estate; And therefore if an Obligation be made with a Condition endorsed, the Plaintiff in Debt upon it doth not speak of the Condition in his Count, but if the Condition be precedent, or stands comprised within the body of the Obligation, then he ought to speak of it in his Count, as appeareth by 28 H. 8. where a Man was bound in twenty Quarters of Malt, to be paid at such a day, and if he fail, that he shall pay forty Quarters at such a day, if he demand the forty Quarters in his Count, he ought to shew the default of payment of the twenty Quarters at the day limited for it, and yet the Condition that is out of, and that which is comprehended within the Obligation are but as one for the substance, but for the form it differs as to the pleading, which form ought to be observed.

Another reason is in this case, because that the Payment of the Rent is limited to be made at the Receit of the Exchequer, in which case if it had been paid, the Payment had been entred of Record, and not being so, the Default appeareth of Record, and where the Default appeareth of Record, there needs no Office, for it shall be in vain to make that to appear upon Record by Office, which otherwise appeareth of it self by Record, and therefore in 4 and 5 of Philip & Mary it appeareth, where Sir John Savage was Sheriff of the County of W. in Fee, and that he was indicted of two several voluntary Escapes of Felons, and for not keeping of his Turn in loco consueto upon two Indictments removed into the Kings Bench in 8 H. 8. upon the motion of the Attorney-general the Office was seised into the Kings hand without Scire facias, or any Inquisition found thereof, and as appeareth, 3 Eliz. One Blake who by Patent was the King's Remembrancer in the Exchequer being made one of the Barons of the same Exchequer, the other Office was ipso facto gone and determined, and there need no Inquisition to be made of it, nor Scire facias to avoid it, because the taking of the Office of a Baron is of Record; And a Man cannot be a Judge and a Minister in one and the same Court, and therefore the first Office is determined by taking of the second, and there need

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no Office to be found of it, the matter it ſelf being apparent upon Record and therefore as it appeareth it was adjudged in 13 H. 8. that a new Patent of the ſame Office of Remembrancer making recital of the former Patent (which appeared as before upon Record to be void) with a Clauſe Quod poſt mortem five determinationem, &c. thereof, the new Grant ſhall take effect, was void. And Englefield's Caſe was lately adjudged in the Exchequer (and at the Parliament 35 Eliz. allowed to be good Law by all the Juſtices there being) where the Queen had a Condition given to her by Forfeiture upon an Attainder of Treaſon to be performed by the payment of a ſum of Money, or the like: If the Queen makes a Warrant by Patent to one to perform the Condition, and to return his Proceedings thereupon into the Exchequer, who performs it accordingly, and thereupon returns all that he hath done with his Warrant into the Exchequer, no Office need to be found of the performance of the Condition, becauſe that by the Return (which is warranted by the Patent) the Condition appeareth ſufficiently upon Record to be performed, and therefore no Office need to be found, no more of the Not-payment in this caſe. It hath been ſaid by ſome, that it may be that the Patentee hath tendred the Rent at the Receit, and that they would not receive or record the Receipt of it, and that then it ſhould be hard that he ſhould loſe his Leaſe, no Default being in him: to which I ſay, ſuppoſe a Man be bound to make his Appearance in any of the King's Courts, may he ſay, that he appeared there according to the Obligation, and excuſe himſelf by ſuch bare Averment thereof, unleſs his Appearance be entred of Record? It is clear that he cannot, as appeareth by 18 E. 4. for Appearance in a Court of Record, is not unleſs it be of Record, yet it may be ſaid, that then the Caſe may be had to the Party: As if the Officer will not record his Appearance, which is the ſame miſchief as in this Caſe, but this will not help him, for firſt the Law preſumes that every Officer will be indifferent betwixt Party and Party; and upon this Opinion had of him he is admitted to his Office, whereupon the Law preſumes that if the Party would have appeared, that the Officer would have recorded it, and in as much as he did not do it, it ſhall be taken that he did not appear. But the ſtrongeſt reaſon in the Caſe is this, to wit, if Default be not in the Party to do that which he ought to do, but in the Officer to do that which belongeth to his Office, as to record that which he ought to record, there the Officer ſhall be chargeable to the Party in an Action upon the Caſe, to anſwer him ſo much in Damages as he hath ſuſtained by ſuch default of the Officer, and the Law will put the Party rather to ſuch a Recovery than to anſwer it by a bare matter of Averment which ought to be of Record. And further ſuch a voluntary default may be a forfeiture of his Office, and ſo a ſufficient Penalty in caſe of an Officer. And to ſay, that the Office of Receipt is not an Office of Record, is too abſurd, for it is a principal member and part of the Court of Exchequer, and as well of Record, for the matters belonging to it, as the Offices of the Pipe and Remembrancers are for thoſe things which belong to them, and the Records of Receipt as well enrolled in Rolls of Parchment as any other Records of the Queen in this, or any other Court, and it is commonly uſed now to convey Reverſions and Remainders to the Queen, with a Proviſo to be void upon payment of a certain ſum of Money to the Queen at the Receipt of the Exchequer, and it is as uſual upon Payment made there to have it back again without Office found of this Payment; and what is the reaſon of it? now, but becauſe the Payment there is always entred upon Record, and therefore no Office needs make this Payment to appear upon Record. And for the Caſe of Sir Robert Cheſter, 4 Eliz. there is great diverſity between that and this Caſe, for it is ordained by the Act that upon default of Payment (which is not limited there to be made at the Receipt) the Office ſhall be forfeited, and not that the Eſtate in the Office ſhall ceaſe: And of a thing forfeited it is at the Election of him who is to take advantage of the Forfeiture, whether

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he will take it or not, and till the advantage taken thereof the Party ſtill remains an Officer.

And therefore if the Quæn make a Leaſe for years, and the Termor makes a Feoffment in Fee, the Term by this is extinct, as was agreed upon an Evidence in the Exchequer, 28 Eliz. in the Caſe of Drayton Baſſet, and before that, in the ſame Caſe in the King's Bench, and yet no Reverſion is drawn thereby out of the Quæn. Suppoſe then that the Quæn before any Office found thereof, grant the Land over in Fee, ſhall not the Patentee take advantage thereof by extinguiſhing the Term? It is clear that he ſhall, and albeit a Termer holdeth over his Term, yet the Patentee of the Quæn, and alſo the Bargainee of a common Perſon after the Enrolment of the Bargain ſhall take advantage of this determination of the Term.

And for the not reciting of Throgmorton's Leaſe in the Letters Patents made to Finch and Audeley, it is to no purpoſe to ſpeak to it, becauſe the Eſtate was finiſhed before the Grant; And further, becauſe there was a Non obſtante in the Patent, that it ſhall be effectual, notwithſtanding any not recital of any Leaſe being of Record, or not being of Record, Mil-recital, &c. which was by all at the Bench admitted to be good, and not contradicted by any.

And for the Office found after the Grant made, I did not ſpeak to it, becauſe it is of no purpoſe to help the Patentee, but yet ſhall ſerve the Quæn for the mean Profits, as hath bæn ſaid: See more of this Caſe, Trin. 36 Eliz. pl. 2.

Trinity Term, 35 *Eliz.*

Hughes *verſus* Robotham.

MEredith Hughes brought an Action upon the Caſe againſt William Robotham Executor to James Robotham, for that the Plaintiff in the life time of the ſaid Teſtator, to wit, the 12th of April, 28 Eliz. at London, in ſuch a Pariſh and Ward, was poſſeſſed of a Meſſuage, with the Appurtenances, in the ſame Pariſh and Ward, for divers years then to come; And whereas alſo the ſaid Teſtator was then poſſeſſed of the Reverſion thereof after divers years then alſo to come, and ſo poſſeſſed, the ſaid Teſtator the ſaid 12th day of April, at London, in the Pariſh and Ward aforeſaid, in conſideration that the Plaintiff at the inſtance and requeſt of the Teſtator in his life time would ſurrender all his Eſtate and Term of years which he then had to come in the ſaid Meſſuage, with the Appurtenances, and procure one Thomas Thornell to give to the ſaid Teſtator an hundred Marks for a Leaſe thereof to be made by the ſaid Teſtator to the ſaid Thornell, he aſſumed and promiſed to pay to the Plaintiff 30 l. of the ſaid 100 Marks, when he ſhould be thereunto required by the Plaintiff.

And the Plaintiff alledged in facto, that he at the inſtance and requeſt of the ſaid Teſtator in his life time afterwards, to wit, the 20th day of April, 28 Eliz. at London, in the Pariſh and Ward aforeſaid, ſurrendred to the ſaid Teſtator all the Eſtate and term of years which he then had to come in the ſaid Meſſuage, &c. and that he, the ſame 20th day of April, in the ſame Pariſh and Ward, procured the ſaid Thornell to give to the ſaid Teſtator an hundred Marks for a Leaſe of the ſaid Meſſuage, &c. by the Teſtator to the ſaid Thornell, then and there made for 19 years, from the Feaſt of the Annunciation of our Lady then laſt paſt, and that yet the ſaid Teſtator in his life time, nor the ſaid Defendant after his death, have not paid to him the ſaid 30 l. albeit the ſaid Teſtator in his life time, to wit, the 24th day of April aforeſaid, at London, in the Pariſh and Ward aforeſaid, as thereunto required by the ſaid Plaintiff, and albeit the Defendant after the death of the ſaid Teſtator, to wit, the 10th day of April, 32 Eliz. in the Pariſh and Ward aforeſaid, was

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alſo thereunto required by the ſaid Plaintiff: And albeit there were ſufficient Goods and Chattels of the ſaid Teſtator at the time of his death, to pay as well the ſaid 30 l. as all other Debts of the ſaid Teſtator, and alſo to diſcharge the Funerals of the ſaid Teſtator, which Goods and Chattels came to the ſaid hand of the ſaid Defendant, &c.

And after Non aſſumpſit pleaded, and a Verdict for the Plaintiff, exception was taken in Arreſt of Judgment, that the Declaration was not good.

1. Becauſe it is, that the Plaintiff the 20th day of April, 28 Eliz. ſurrendred all the Eſtate and Term which he had then to come, and this (for any thing ſhewn) may be another Term than he had the 12th day before, for it is not ſaid, and ſo being poſſeſſed the 20th day he ſurrendred, but generally as before.

And further the Conſideration was, that he ought to ſurrender all the Term which he had the 12th day of April, which cannot be made the 20th day, for in the mean time, part of the Term is incurred, and therefore the purpoſe was that the Surrender ſhould have been made immediately as ſoon as might be, ſo as by the delay thereof the ſaid Robotham ſhould not loſe any part of the Term to come.

And it was further alledged, that a Term for years cannot be ſurrendred to another Termer for years.

Gawdy, The Conſideration is, that the Plaintiff at the requeſt of the Teſtator in his life time ſhould ſurrender, ſo that it is not to be done until he be required by the Teſtator, and not inſtantly at his peril without Requeſt precedent; and here it is alledged that the Plaintiff at the requeſt of the ſaid Teſtator, the 20th day of April ſurrendred, which is well done, and according to the Agreement, and albeit it had been more formal to have ſaid that the ſaid Plaintiff ſo being poſſeſſed afterwards, to wit, the 20th day of April, ſurrendred, &c. yet it ſhall not be intended that he had any other Term than that which he had before, if it be not ſhewn on the other ſide in his Bar, and eſpecially here, where the Action is not grounded upon the Term, but upon the Aſſumpſit, and the Conſideration is nothing but an inducement to the Aſſumption, which is not ſo formal to be made as if the Action had been grounded upon the Term it ſelf. And therefore in an Action upon the Caſe upon an Aſſumpſit, it ſufficeth to ſay, that whereas the Defendant was indebted to the Plaintiff in divers ſums of Money amounting in all to an 100 l. the Defendant aſſumed to pay him the 100 l. at ſuch a day, without ſaying, how, or in what manner theſe Debts accrued, or when, becauſe the Action is not meerly founded upon the Debt but upon the Promiſe, and the Debts are but inducements to it: But if it were to recover the Debts themſelves in an Action of Debt, there ought to be made a Certainty thereof, to wit, when, and how it comes.

And further here, in as much as the Aſſumpſit is found for the Plaintiff, it ſhall be implyed that the Conſideration was duly performed, for without due proof of the Conſideration the Plaintiff hath failed of his Aſſumption, and therefore alſo it ſhall be now taken that the Teſtator hath ſuch a Term of years in Reverſion, to which the Term for years in Poſſeſſion may be ſurrendred, for he ſaid, that he who hath ten years in Poſſeſſion may well ſurrender to him who hath more years, as twenty in Reverſion; for the leſſer may ſurrender to the greater Term. To all which Popham and Fenner agreed: And Popham ſaid further, although it ſhall be taken moſt ſtrongly againſt Hughes, to wit, that Robotham had a leſſer Term in the Reverſion than Hughes had in the Poſſeſſion, yet the Surrender ſhall be good, for in Law it is greater and more beneficial for him to have a leſſer Term to be a Term in Poſſeſſion, than to have it to be in Reverſion: And by him, if a Leſſee for twenty years make a Leaſe for ten years, then he which makes the Leaſe for ten years hath a Reverſion upon theſe ten years, ſo that if Rent be reſerved upon it, he may diſtrain

ſtrain for it and have Fealty of the Termor: And if he grant the Reverſion over for ten years, with Attornment of the Termor in Poſſeſſion, the Grantee hath the Reverſion and ſhall have the Rent for the time, and yet the Remainder for years remains always to the Grantor, and therefore before the Reverſion granted over, the Termor for ten years in Poſſeſſion might have ſurrendred to his Leſſor, and thereby the ſaid Leſſor ſhall have ſo many of the ſaid years which were then to come of his former Term of twenty years; And after the Reverſion granted, he, which hath the ten years may ſurrender to the Grantee of ten years in Reverſion, and there he ſhall have ſo many years in Poſſeſſion which were to come of his Reverſion, Quod nota bene: And if he had had a leſſer Term in the Reverſion than the Leſſor himſelf had in the Poſſeſſion, it ſhall go to the benefit of the firſt Termor for twenty years, who was his Grantor, for the Term in Poſſeſſion is quite gone and drowned in the Reverſion to the benefit of thoſe who have the Reverſion thereupon, having regard to their Eſtate in the Reverſion, and not otherwiſe: to all which Fennor agreed, whereupon Gawdy gave the Rule that Judgment ſhall be entred for the Plaintiff: But Popham ſaid, that if the Conſideration for the Surrender had not been ſufficently alledged, that the Plaintiff ſhould not be helped by the other Conſideration of an hundred Marks given by Thomell, for if ſuch an Aſſumption as this is be founded upon two more Conſiderations, and ſuch which by poſſibility may be performed, then the Party hath failed of his Suit: As if a Man in Conſideration of 5 s. paid, and of other 5 s. to be paid at a day to come, aſſume to do a thing, or to pay Money, if the one 5 s. be not paid, or if it be not averred that the other 5 s. was paid at the day limited for the Payment of it, the Party hath failed in his Aſſumption in the one Caſe, and the Declaration is inſufficient in the other Caſe, for he hath made a Departure from his Conſideration: But if one of the Conſiderations be impoſſible, or againſt Law, there the other Conſiderations that are poſſible, or ſtand with the Law ſuffice if they be well alledged. And he ſaid, that the Executor ſhall be charged with the Contract of the Teſtator by common courſe of the Court, which ſtands upon reaſon, for if an Action of Debt upon a bare Contract be brought againſt an Executor, if he do not demur upon it, but plead to the Pais, that he owes him nothing, and it is found againſt him, he ſhall be thereby charged of the Goods of the Dead; and the cauſe why he may be helped by demurring upon the Declaration in that caſe, is, becauſe the Teſtator might have waged his Law in that Caſe of Debt, which the Executor could not do of other Contracts, and therefore ſhall not be charged with it by ſuch an Act, if he will help himſelf by Demurrer; but in the Aſſumption of his Teſtator, he could not have waged his Law: and it is founded upon the death of the Teſtator, to wit, his Debt, with which the Executor by a mean may be charged as before, and therefore the Aſſumption in ſuch a Caſe maintainable againſt the Executor. But if the Teſtator upon good Conſideration aſſume to make Aſſurance of Land, or to do any other ſuch collateral thing which doth not ſound in a duty of a thing payable, there the Executor ſhall never be charged with ſuch an Aſſumption to render Recompence for it. And to this agreed all the Juſtices of the Common Bench, and Barons of the Exchequer; And ſuch an Aſſumption hath not been allowed in the King's Bench but of late time, and that but in one or two Caſes. But in the other Caſe it hath been common and of long time uſed, and therefore now too late to be drawn in queſtion; and if it ſhould be, it may be maintained with good reaſon in this Caſe of a duty of a thing payable, in as much as the Teſtator cannot wage his Law in the Action, but in the other Caſe there is no reaſon nor courſe of the Court to maintain it: But the Judges in the Exchequer Chamber reverſed all theſe Judgments in both Caſes.

6. Co. Rep. Part 9. f. 87. Pinchon's Caſe

2. Nota

2. Nota, that this Term was adjourned to Octob. Trin. and because the Writ was, that Adjournment shall be made in Octob. Trin. of all Cases, until Tres Trinitat. the Adjournment was made in every of the Courts of King's Bench, Common Bench, and the Exchequer, the very first day of Octob. Trin. then it was holden by the Justices, that the Adjournment ought not to have been made until the sitting of the Court the fourth day from Octabis.

And because that the Writs were, that at the said Tres Tr. the Term shall be holden thereafter, as if no Adjournment had been, the Justices held that they ought to sit the first day of the said Tres Trin. and so from thence every day until the end of the Term, and for all Causes, as if no Adjournment had been; and so they did accordingly, saving by Assent some of the Justices did not come thither by reason of their far distance from London, at the end of the Term upon the last Adjournment; But they held, that if it had not been for the especial words in the Writ, which were, that it shall be then holden as if no Adjournment had been, the Essoins had been the first day of Tres Trin. and the full Term had not been until the fourth day, which was the last day of the Term, quod nota, and so it was of the Adjournment which happened first at Westminster, and afterwards at Hertford from Michaelmas Term now last past.

Michaelmas Term, 35 and 36 *Eliz.*

Gravenor *versus* Brook, *and others.*

1. IN an Ejectione firmæ by Edward Gravenor Plaintiff, against Richard Brook and others Defendants, the Case appeared to be this; Henry Hall was seised in his Demesn as of Fee, according to the custom of the Mannor of A. in the County of D. of certain customary Tenements holden of the said Mannor called Fairchildes and Preachers, &c. In the third year of H. 8. (before which time the customary Tenements of the said Mannor had always been used to be granted by Copy of Court-Roll of the said Mannor in Fee-simple, or for life or years, but never in Fee-tail but then) the said Henry Hall surrendred his said Copy-hold Land, to the use of Joan his eldest Daughter for her life, the Remainder to John Gravenor the Eldest Son of the said Joan, and to the Heirs of his Body, the Remainder to Henry Gravenor her other Son, and the Heirs of his Body, the Remainder to the right Heirs of the said Henry Hall for ever; whereupon in 3 H. 8. at the Court then there holden, a Grant was made by Copy of Court-Roll accordingly, and Seisin given to the said Joan by the Lord accordingly.

Henry Hall died, having Issue the said Joan and one Elizabeth, and at the Court holden within the said Mannor, 4 H. 8. the death of the said Henry Hall was presented by the Homage, and that the said Daughters were his Heirs, and that the Surrender made as before was void, because it was not used within the said Mannor to make Surrenders of Estates Tail, and thereupon the said Homage made division of the said Land, and limited Fairchildes for the Purparty of the said Joan, and Preachers for the Purparty of the said Elizabeth, and Seisin was granted to them accordingly.

Elizabeth died seised of her said part, after which, 33 H. 8. Margaret her Daughter was found Heir to her, and admitted Tenant to this part; after which Joan died seised of the said Tenements as the Law will.

60's Rep: Part 3. P. 8. Hogdon's Case.

And after the ſaid Margaret takes to Husband one John Adye, who with his ſaid Wife ſurrendred his ſaid part to the uſe of the ſaid John Adye and of his ſaid Wife, and of their Heirs; and afterwards the ſaid Margaret died without Iſſue, and the ſaid John Adye held the part of the ſaid Wife, and ſurrendred it to the uſe of the ſaid Richard Brook, and of one John North, and their Heirs who were admitted accordingly, after which, the ſaid John Gravenor died without Iſſue, and now the ſaid Henry Gravenor was ſole Heir to him, and alſo to the ſaid Henry Hall who had Iſſue Edward Gravenor, and died, the ſaid Edward entred into the ſaid Land called Preachers, and did let it to the Plaintiff, upon whom the ſaid Richard Brook and the other Defendants did re-enter and eject him. And all this appeareth upon a ſpecial Verdict.

And by Clench and Gawdy, an Eſtate Tail cannot be of Copy-hold Land, unleſs it be in caſe where it hath been uſed, for the Statute of Donis conditionalibus ſhall not enure to ſuch cuſtomary Lands, but to Lands which are at Common Law, and therefore an Eſtate Tail cannot be of theſe cuſtomary Lands, but in caſe where it hath been uſed time out of mind, and they ſaid, that ſo it hath been lately taken in the Common Bench; But they ſaid, that the firſt Remainder limited to the ſaid John Gravenor here upon the death of the ſaid John, was a good *Fee-ſimple* Conditional, which is well warranted by the Cuſtom to demiſe in *Fee*, for that which by Cuſtom may be demiſed of an Eſtate in *Fee* abſolute, may alſo be demiſed of a *Fee-ſimple* Conditional, or upon any other Limitation, as if I. S. hath ſo long Iſſue of his Body, and the like, but in ſuch a Caſe no Remainder can be limited over, for one *Fee* cannot remain over upon another, and therefore the Remainder to the ſaid Henry was void: But they ſaid, that for all the Life of the ſaid John Gravenor, nothing was in the ſaid Elizabeth which could deſcend from her to the ſaid Margaret her Daughter, or that might be ſurrendred by the ſaid Margaret and her Husband, and therefore the ſaid Margaret dying without Iſſue, in the life time of the ſaid John Gravenor who had the *Fee-ſimple* Conditional, nothing was done which might hinder the ſaid Edward, Son to the ſaid Henry Gravenor of his Entry, and therefore the ſaid Plaintiff ought to have his Judgment to recover, for they took no regard to that which the Homage did, 4 H. 8.

But Fenner and Popham held, that an Eſtate Tail is wrought out of Copy-hold Land by the Equity of the Statute of Donis conditionalibus, for otherwiſe it cannot be that there can be any Eſtate Tail of Copy-hold Land, for by Uſage it cannot be maintained, becauſe that no Eſtate Tail was known in Law before this Statute, but all were *Fee-ſimple*, and after this Statute it cannot be by Uſage, becauſe this is within the time of Limitation, after which an Uſage cannot make a Preſcription, as appeareth 22 & 23 Eliz. in Dyer: And by 8 Eliz. a Cuſtom cannot be made after Weſtm. 2. And what Eſtates are of Copy-hold Land, appeareth expreſly by Littleton, in his Chapter of Tenant by Copy-hold, &c. And in Brook Title, Tenant by Copy-hold, &c. 15 H. 8. In both which it appeareth that a Plaint lyeth in Copy-hold Land in the nature of a Formedon in the Deſcender at Common Law, and this could not be before the Statute of Donis Conditionalibus for ſuch Land, becauſe that before that Statute there was not any Formedon in the Deſcender at Common Law, and therefore the Statute helps them for their Remedy for intailed Land which is cuſtomary by Equity: And if the Action ſhall be given by Equity for this Land, why ſhall not the Statute by the ſame Equity work to make an Eſtate in Tail alſo of this nature of the Land? We ſee no reaſon to the contrary; and if a Man will well mark the words of the Statute of Weſtm. 2. cap. 1. he ſhall well perceive that the Formedon in Deſcender was not before this Statute, which wills that in a new Caſe a new Remedy may be given, and thereupon ſets the form of a Formedon in Deſcender: But as to

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the Formedon in the Reverter, it is then ſaid, that it is uſed enough in Chancery, and by Fitzherbert in his Natura brevium: the Formedon in the Deſcender is founded upon this Statute, and was not at Common Law before; And the reaſon is, becauſe theſe Copy-holds are now become by uſage to be ſuch Eſtates that the Law allows them to be good againſt the Lords themſelves, they performing their Cuſtoms and Services, and therefore are more commonly guided by the Guides and Rules of the Common Law, and therefore as appeareth in Dyer, Trin. 12 Eliz. Poſſeſſio fratris, of ſuch an Eſtate, facit ſororem eſſe hæredem. And to ſay that Eſtates of Copy-hold Land are not warranted but by Cuſtom, and every Cuſtom lies in Uſage; and without Uſage a Cuſtom cannot be, is true, but in the Uſage of the greater the leſſer is always implyed: As by Uſage, three Lives have been always granted by Copy of Court Roll, but never within memory, two, or one alone, yet the Grant of one or two Lives only is warranted by this Cuſtom, for the uſe of the greater number warrants the leſſer number of Lives, but not e converſo: And ſo Fee-ſimples upon a Limitation, or Eſtate in Tail are warranted by the Equity of the Statute, becauſe they are leſſer Eſtates than are warranted by the Cuſtom, and theſe leſſer are implyed as before in the greater, and none will doubt but that in this Caſe the Lord may make a Demiſe for life, the Remainder over in Fee, and it is well warranted by the Cuſtom, and therefore it ſeems to them that it is a good Eſtate Tail to John Gravenor, and a good Remainder over to Henry his Brother, and if ſo, it follows that the Plaintiff hath a good Title to the Land, and that Judgment ought to be given for him. And for the dying ſeiſed of Elizabeth, they did not regard it, for ſhe cannot die ſeiſed of it as a Copy-holder, for ſhe had no right to be Copy-holder of it: And by the dying ſeiſed of a Copy-holder at Common Law, it ſhall be no prejudice to him who hath Right, for he may enter; But here in as much as ſhe cometh in by admittance of the Lord at the Court, her Occupation cannot be tortious to him, and therefore no Deſcent at Common Law by her dying ſeiſed, for it was but as an Occupation at Will. But if it ſhall not be an Eſtate Tail in John Gravenor, as they conceive ſtrongly it is, yet for the other cauſes alledged by Gawdy and Clench, Judgment ought to be given for the Plaintiff, and the Remainder which is not good ſhall not prejudice the Fee-ſimple Conditional granted to John, which is no more than if the Surrender had been to the uſe of John Gravenor and his Heirs, the Remainder over, becauſe that we as Judges ſee that this cannot be good by Law, and therefore not to be compared to the Caſe where the Cuſtom warrants but one Life, and the Lord grants two joyntly or ſucceſſively, there both the one and the other is void: And this is true, becauſe the Cuſtom is the cauſe that it was void, and not the Law, and alſo it is a larger Eſtate than the Cuſtom warrants, which is not here, and upon this Judgment was given that the Plaintiff ſhall recover.

And by Popham, it hath been uſed, and that upon good Advice in ſome Pannes, to bar ſuch Eſtates Tail by a common Recovery proſecuted in the Lord's Court, upon a Plaint in Nature of a Writ of Entry in the Poſt.

2. JUlius Cæſar Judge of the Admiralty Court, brought an Action upon the Caſe for a Slander againſt Philip Curtine a Merchant-ſtranger, for ſaying that the ſaid Cæſar had given a corrupt Sentence; and upon [illegible] guilty pleaded, and 200 Marks Damages given, it was alledged in Arreſt of Judgment, where it was tryed, by Niſi prius at the Guild-hall by a partial Inqueſt, becauſe that upon the default of Strangers, one being challenged and tryed out a Tales was awarded De circumſtantibus by the Juſtice of Niſi prius; whereas (as was alledged) a Tales could not have been granted in this caſe, for the Statute of 36 H. 8. cap. 6. which gives the Tales is to be intended but of common Tryals of Engliſh, for the Statute ſpeaks at the beginning but of ſuch

Juries, which by Law ought to have 40 s. of Frée-hold, and wills that in ſuch Caſes the Venire facias ought to have this Clauſe, Quorum quilibet habeat 40 s. in terris, &c. which cannot be intended of Aliens which cannot have Frée-hold: and it goes further that upon default of Jurors, the Juſtices have Authority at the Prayer of the Plaintiff or Defendant, to command the Sheriff or other Miniſter to whom it appertaineth to make a Return of ſuch other able Perſons of the ſaid County, then preſent at the ſame Aſſiſes or Niſi prius which ſhall make a full Jury, &c. which cannot be intended of Aliens, but of Subjects, and therefore ſhall be of Tryals which are only of Engliſh, and not of this Inqueſt which was part of Aliens.

And further the Tales was awarded only of Aliens, as was alledged on the Defendant's part, but in this point it was a miſtake, for the Tales was awarded generally de circumſtantibus, which ought always to be of ſuch as the principal Pannel was. But Per Curiam the Exceptions were diſallowed, for albeit the Statute is, as hath been ſaid, yet when the Statute comes to this Clauſe, which gives that a Tales may be granted by the Juſtices of Niſi prius, and is generally referred to the former part of the Act, for it is added; Furthermore be it enacted that upon every firſt Writ of Habeas Corpora, or Diſtringas with a Niſi prius, &c. the Sheriff, &c. ſhall return upon every Juror 5 s. Iſſues at the leaſt, &c. which is general of all: And then it goes further, And wills that in every ſuch Writ of Habeas Corpora, or Diſtringas with a Niſi prius where a full Jury doth not appear before the Juſtices of Aſſiſe, or Niſi prius, that they have power to command the Sheriff, or other Miniſter to whom it appertains, to nominate ſuch other Perſons as before, which is general in all places where a Niſi prius is granted, and therefore this is not excepted neither by the Letter nor Intent of the Law. And where it is ſaid (ſuch Perſons) by it, is to be intended ſuch as the firſt, which ſhall be of Aliens as well as Engliſh, where the Caſe requires it, for Expedition was as requiſite in Caſes for, or againſt them, as if it were between other Perſons. And Aliens may well be of the County or place where the Niſi prius is to be taken, and may be there: for although an Alien cannot purchaſe Land of an Eſtate of Frée-hold within the Realm, yet he may have an Houſe for Habitation within it, for the time that he is there, albeit he be no Deniſen, but be to remain there for Merchandiſe, or the like: And by Gawdy, where the defaute was only of Strangers, the Tales might have been awarded only of Aliens, as where a thing is to be tryed by Inqueſt within two Counties, and thoſe of the one County appear, but not thoſe of the other, the Tales might be of the other County only.

Davies *verſus* Gardiner.

Vide this Caſe reported, *Coke lib.* 4. 16. *b.*

3. AN Action upon the Caſe for Slander was brought by Anne Davies, againſt John Gardiner; That whereas there was a Communication of a Marriage to be had between the Plaintiff and one Anthony Elcock, the Defendant to the intent to hinder the ſaid Marriage, ſaid, and publiſhed, that there was a Grocer in London that did get her with Child, and that ſhe had the Child by the ſaid Grocer, whereby ſhe loſt her Marriage. To which the Defendant pleaded Not guilty, and was found guilty at the Aſſiſes at Aylesbury to the Damages of 200 Marks: and now it was alledged in Arreſt of Judgment, that this matter appeareth to be meerly Spiritual, and therefore not determinable at Common Law, but to be proſecuted in the Spiritual Court. But per Curiam the Action lies here, for a Woman not married cannot by Intendment have ſo great Advancement as by her Marriage, whereby ſhe is ſure of Maintenance for her life, or during her Marriage, and Dower and other Benefits which the Temporal Laws give by reaſon of her Marriage

age, and therefore by this ſlander ſhe is greatly prejudiced in that which is to be her Temporal Advancement, for which it is reaſon to give her Remedy by way of Action at Common Law: As if a Woman keep a Victualling-houſe, to which divers of great Credit repair, whereby ſhe hath her Livelihood, and one will ſay to her Gueſts, that as they reſpect their Credits, they take care how they uſe ſuch an Houſe, for there the Woman is known to be a Bawd, whereby the Gueſts avoid her Houſe, to the loſs of her Huſband, ſhall not ſhe in this caſe have an Action at Common Law for ſuch a Slander? It is clear that ſhe will. So, if one ſaith, that a Woman is a common Strumpet, and that it is a Slander to them to come to her Houſe, whereby ſhe loſeth the advantage which ſhe was wont to have by her Gueſts, ſhe ſhall have her Action for this at Common Law.

So here upon theſe collateral Circumſtances, whereby it may appear that ſhe hath more prejudice than can be by calling of one Harlot, and the like.

And Judgment was given for the Plaintiff.

Hillary Term, 36 *Eliz.* in the *King's Bench.*

IN Michaelmas Term, 33 & 34 Eliz. Rot. 181. William and Joan his Wife, Adminiſtratrix of Andrew Stock, brought an Action upon the Caſe upon an Aſſumpſit, made to the Inteſtate for the payment of 5 l. to William Stock, who imparled until Tueſday next after, Octa. Hillary next, which was the 24th day of January, and then the Defendant demanded Oyer of the Letters of Adminiſtration which were entred, in hæc verba.

Whereby it appeareth that the Letters of Adminiſtration were committed to the ſaid *Joan* by *Thomas Taylor* Batchelor of Law, Commiſſary to the Biſhop of *London*, *&c.* whereby the Defendant pleaded, that after the laſt Continuance, the ſaid Letters Patents of Adminiſtration, ſealed with the Seal of the Vicar General of the ſaid Biſhop, which he uſeth in this behalf, and brought here into Court, bearing date the 27th day of *January*, 1591. which was three days after the Continuance, committed the Adminiſtration to the ſaid Defendant. And pleaded further the Act of 37 H. 8. which ſays, that it ſhall be lawful hereafter for any Perſon, being a Doctor of the Law, to be Chancellor, Commiſſary, or to exercile Eccleſiaſtical Juriſdiction, albeit he were a mere Lay Perſon, ſo that ſuch a Perſon be a Doctor as aforeſaid, and avers, that at the time of the committing of the Adminiſtration to the ſaid Joan, the ſaid Thomas Taylor was a mere Lay Perſon, and not Doctor Legis civilis nec miniſter allocatus, according to the Laws of the Church of England, whereby he had no lawful power to commit the Adminiſtration.

Upon which it was demurred generally, and by all the Court the Plaintiff had Judgment to recover; for we are to conſider what our Law was in this caſe before the Statute of 37 H. 8. And albeit a Doctor then affirmed, that the Canon Law was, that there was a mere Nullity in ſuch Adminiſtration, ſo although the Party that did it, not being a Clerk nor Doctor, according to the Statute of 37 H. 8. yet all the Juſtices agreed, that the Adminiſtration ſo committed will be adjudged in our Law to be of force and effect, being ſhewn under the Seal of the Officer and committed by him, who is reputed the Officer, who ought to do it, and is inveſted in the Office until it be avoided by Sentence, and yet ſuch an Avoidance ſhall not make a Pan's Act to be made void, no more than if a mere Lay-man be preſented to a Benefice, albeit this be a mere Nullity in our Law, and void, yet we adjudge the Church full, according to the publick Admiſſion, Conſtitution and Induction, and not according to the capacity of the Perſon, which is a thing ſecret, until ſuch an one be deprived for it by Sentence in the Spiritual Court, and yet the Church ſhall be in our Law void but from the time of Deprivation, of which notice ought to be given to the Patron.

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So here, he remains as to our Law an Officer until his Authority be defeated by Sentence of the Spiritual Court, otherwiſe great miſchief will happen; for an infinite number of Adminiſtrations may be drawn in queſtion by Averment, that he, who granted them was a meer Lay Perſon, and ſo make ſuch Gazboils in the Commonwealth, which is not to be ſuffered for the inconveniency which will happen by it; and therefore our Law which is founded upon Reaſon ſhall judge of it according to the open appearance of the Officer, to wit, that he hath a Grant made to him, and not according to the private capacity of the Perſon, and this is not altered by the ſaid Statute which is made in Affirmation of it, and makes the Authority of a Doctor of Law abſolute, not to be defeated by the Civil or Canon Law, which is not in the other Caſe: But yet it doth not make this Caſe of worſe condition than it was at Common Law. And by all the pleading of the Adminiſtration committed to the Defendant, is not good, becauſe it appeareth by the date of it, that it was made after the day of the laſt Continuance, and therefore could not have been pleaded until a new Continuance after: And by the Doctor the laſt Adminiſtration does not avoid the firſt, but in caſe where there is an eſpecial Revocation of the firſt: But they did not ſpeak of the doubleneſs becauſe the Demurrer was gereral and not ſpecial, and alſo becauſe the other matters were ſo clear.

Property.

2. IN Treſpaſs for carrying away certain Loads of Hay, the Caſe happen to be this; The Plaintiff pretending Title to certain Hay which the Defendant had ſtanding in certain Land, to be more ſure to have the Action paſs for him, took other Hay of his own (to wit, the Plaintiff) and mixed it with the Defendants Hay, after which the Defendant took and carried away both the one and the other that was intermixed, upon which the Action was brought, and by all the Court clearly the Defendant ſhall not be guilty for any part of the Hay, for by the Intermixture (which was his own Act) the Defendant ſhall not be prejudiced as the Caſe is, in taking the Hay. And now the Plaintiff cannot ſay which part of the Hay is his, becauſe the one cannot be known from the other, and therefore the whole ſhall go to him who hath the Property in it with which it is intermixed. As if a Man take my Garment and embroider it with Silk, or Gold, or the like, I may take back my Garment: But if I take the Silk from you, and with this, face or embroider my Garment, you ſhall not take my Garment for your Silk which is in it, but are put to the Action for taking of the Silk from you.

So here, if the Plaintiff had taken the Defendants Hay and carried it to his Houſe, or otherwiſe, and there intermixed it with the Plaintiffs Hay, there the Defendant cannot take back his Hay, but is put to his Action againſt the Plaintiff for taking his Hay. The difference appeareth, and at the ſame day at Serjeants Inn in Fleet-ſtreet, the difference was agreed by Anderſon, Periam, and other Juſtices there, and this Caſe was put by Anderſon: If a Gold-ſmith be melting of Gold in a Pot, and as he is melting it, I will caſt Gold of mine into the Pot, which is melted all together with the other Gold, I have no remedy for my Gold, but have loſt it.

Bullock *verſus* Dibler.

3. IN an Ejectione firmæ between Edward Bullock Plaintiff, and John Dibler Defendant, the Caſe appeared to be this; A Man was ſeiſed of a Copy-hold Tenement, parcel of the Manor of Stratfield Mortimer, in the County of Berks, in Right of his Wife, in his Demeſn as of Fee, and ſurrendred this Copy-hold Tenement by himſelf without his Wife, to the uſe of a Stranger in Fee, who was admitted by the Lord accordingly, the Husband dies, the Wife dies,

dies, the Heir of the Wife without any admittance enters upon the Stranger, and makes a Leaſe for a year to the Plaintiff, upon whom the Defendant in Right of him to whom the Surrender was made, re-enters, and adjuged that the Plaintiff ought to recover; and that the Surrender of the Husband was not as a Diſcontinuance againſt the Wife, to put the Heir to his Plaint in nature of a Sur cui in vita, for a Diſcontinuance ſhall not be by a Deed of Feoffment only, but by it with the Livery enſuing, whereby the entire Fee-ſimple is given, what Eſtate ſoever the Feoffor had by reaſon of the Livery, where by Deed of Grant nothing paſſed but that which the Party might lawfully grant: And here it ſhall be taken if the Grant had been made by the Husband which paſſed but his Eſtate, to wit, that which he might lawfully grant without prejudice to his Wife. But yet there is this diverſity between a Surrender of an Eſtate for Life, and a Surrender of an Eſtate in Fee to the uſe of a Stranger, to wit, that by the one the Eſtate drowned in the Lord by the Surrender, and by the other it is not drowned in the Lord, but is transferred to him to whom it was made, upon which he is admitted to it; otherwiſe, in the laſt Caſe it returns to him who ſurrendred, and then upon the Admittance he is in the Per by him who ſurrendred, and not by the Lord, or by the Surrender made by Tenant for Life, he to whoſe uſe it is made ought to take it of the Lord, and he is there in by him, and not by him who ſurrendred.

And this is the common difference betwixt Cuſtomary Eſtates for Lives, and Cuſtomary Eſtates of Inheritance.

And the Plaint of Cui in vita is given where Recovery by Default is againſt the Husband and Wife, and not upon the Surrender of the Husband; for ſuppoſe the Husband had ſurrendred meerly to the Lord himſelf, yet the Wife might have entred after the death of the Husband, becauſe the Surrender goes but to the Eſtate which the Husband might lawfully part with, and therefore rather to be reſembled to a Grant than to a Feoffment.

And notwithſtanding that he was not admitted, yet he might enter and take the Profits, and make a Leaſe according to the Cuſtom, or bring an Action of Treſpaſs againſt him who diſturbs him: But if the Lord require his Fine or his Services, and the Heir refuſe to do them, this may be a Forfeiture of his Copy-hold; But until lawful Seiſin made by the Lord (becauſe it belongeth to him) the Heir may intermeddle with the Poſſeſſion, albeit he be not admitted by the Lord where it is an Eſtate of Inheritance by the Cuſtom.

And in this Term alſo in another Caſe, in the ſame Court it was adjudged, that an Infant who ſurrenders his Copy-hold Land within Age, may enter at his full Age, without being put to any Suit for it.

And the firſt Caſe was very well argued by one Brock, a Puny utter Bariſter of the Inner-Temple, this Term for the Plaintiff. And it was the firſt Demurrer that he argued in Court.

Forth *verſus* Holborough.

4. IN an Action of Debt upon an Obligation of 200 Marks brought by Robert Forth Doctor of Law, and Mary his Wife, as Executrix to Doctor Drewry, againſt Richard Holborough, the Caſe upon Demurrer appeared to be this; to wit, That the ſaid Doctor Drewry was ſeiſed in his Demeſn as of Fee, of the Scite of the Manor of Goldingham Hall in the County of Eſſex, and ſo ſeiſed the laſt day of November, 27 Eliz. demiſed it to the ſaid Richard Holborough for 17 years from the ſaid laſt day of November, whereby the Defendant entred into it the next day, and was thereof poſſeſſed accordingly, and ſo poſſeſſed the laſt day of November, 28 Eliz. entred into an Obligation to the ſaid Doctor Drewry, with condition, that if he, his Heirs, Executors, Adminiſtrators

ſtrators and Aſſigns, or any of them ſhould well and truly pay or cauſe to be paid to Dorothy Goldingham Widow, or her Aſſigns, at the Manor-houſe of Goldingham Hall in the County of Eſſex, for the Term of 17 years, from the Feaſt of S. Michael the Arch-angel then laſt paſt, or an Annuity or annual Rent of 20 Marks of lawful Engliſh Money, at the Feaſt of the Annunciation of our Lady, and S. Michael the Archangel, by equal Portions, if the ſaid Dorothy ſhall ſo long live, and the ſaid Richard Holborough, or his Aſſigns, or any other claiming by, or under the ſaid Richard, or his Aſſigns, ſhall or may ſo long occupy or enjoy the ſaid Scite of the Manor of Goldingham Hall, that then the Obligation ſhall be void; after which until the 9th day of May, 29 Eliz. the Defendant enjoyed the ſaid Scite, and paid duly the ſaid Annuity, and then he ſurrendred his Eſtate in the ſaid Scite to the ſaid Doctor Drewry, and after this did not pay the Annuity over, and yet continued the Poſſeſſion of the ſaid Scite.

And by all the Juſtices the Defendant notwithſtanding the Surrender made to the Obligæ himſelf, ought to have continued the Payment of the Annuity to the ſaid Dorothy, for albeit the Term be drowned and merged in the Reverſion, and ſo hath not Continuance as to him in the Reverſion, yet as to any thing heretofore done by the Defendant who was the Termor in Judgment of Law, it is to be ſaid to have Continuance: As if he had granted a Rent-charge out of it to have Continuance during the ſaid Term, although he ſurrender his Term to him in the Reverſion, yet the Charge continues, and as to it, the Reverſion ſhall be ſaid to be in the Termor, and albeit the Obligæ himſelf ſhall not take advantage of his own, or to have the advantage of the Forfeiture of an Obligation there, where his own Act is the cauſe of his Breach.

And if it had been, that the ſaid Dorothy during the ſaid Term ſhall have the uſe of a Chamber within the Scite, without the interruption of him, or his Aſſigns, there, if after the Surrender, the ſaid Dorothy Drewry had interrupted him of the uſe of the ſaid Chamber, the Forfeiture of the Obligation ſhall not be taken againſt the Defendant for it.

But here the Condition is of a Collateral thing to be done, to wit, the Payment of the Annuity to a Stranger, with which the Land is not bound, and therefore the Breach comes meerly in default of the Obligor, and of the Obligæ in no part, to wit, and therefore the Obligation here is forfeited.

And by Popham, the Caſe here is more clear upon conſideration of the words of the Condition, for the words are, I the Defendant ſhall, or may enjoy, &c. and this word (may enjoy) ſhall be always intended reaſonably, to wit, if it may without any thing to be done by him to the contrary; and here if he had not made the Surrender, he might have enjoyed the Scite until the end of his Term, and therefore becauſe it cometh of his own Act, whereby he, or his Aſſigns ſhall not enjoy it for the Term, if it ſhall be ſaid, that he in the Reverſion ſhall not be ſaid in, by the Termor of which he himſelf ſhall not take any advantage, in as much as if this had not been, he might have enjoyed for the whole Term. To which all the other Juſtices alſo agréed, and upon this Judgment was given for the Plaintiff.

But if any had defeated the ſaid Term by a lawful Entry, By a Title Paramount, the Obligation had not been forfeited for any Default of Payment, after this Entry, but if Rent had been reſerved upon the Leaſe, and for Default of Payment a Re-entry had been made, yet by Popham the Payment ought to be continued upon the peril of the Forfeiture of the Obligation, for the the words (may enjoy) in as much as there it is the meer default of the Defendant himſelf, there the Leaſe does not continue, of which he ſhall not take advantage to ſave his Obligation. But note the form of the Demurrer, and that it might have been better joyned, which is to be ſeen in the Record where it is entred.

Eaſter

Eaſter Term, 36 Eliz.

Geilles *verſus* Rigeway.

IN Debt for 306 l. 6 s. 8 d. by William Geillies, againſt Thomas Rigeway Eſquire late Sheriff of Devon; For that whereas John Chaunder alias Chaundeler, was in Execution with the ſaid Sheriff for the ſaid Sum, the ſaid Sheriff afterwards, to wit, the 10th day of December, 34 Eliz. at London, in ſuch a Pariſh and Ward ſuffered him to eſcape, the ſaid Rigeway then being Sheriff of Devon, and having him then in Execution, &c. To which the Defendant pleaded, how that he took him in Execution by the Proceſs at Stockram in the County of Devon, as the Plaintiff hath alledged, and there detained him in ſafe Cuſtody until the 8th day of December, 34 Eliz. at which day the ſaid Chaundeler broke the Priſon, and eſcaped out of it contrary to the Will of the ſaid Defendant, and that the Defendant did freſhly purſue him, and in this freſh Purſuit did re-take him the 11th day of December, then next enſuing at Stockram aforeſaid, and detained him in Execution for the ſaid 306 l. 6 s. 8 d. during the time of his Office, and delivered him over to the new Sheriff, &c. To which the Plaintiff replyed by Proteſtation, that he did not make freſh Purſuit; And for Plea ſaith, That after the going away of the ſaid Chaundeler, and before his re-taking by the ſaid Defendant as aforeſaid, the ſaid Chaundeler for a whole day and night, to wit, at London, in the Pariſh and Ward aforeſaid, was out of the view of the ſaid Defendant, &c. upon which it was demurred in Law.

And it was moved by Coke Attorney-general, that Judgment ought to be given for the Plaintiff; for, in as much as it was alledged, that he was out of the view of the Sheriff for a day and a night together, there it ſhall be intended to be a Default in the Defendant in the making of his Purſuit, and therefore chargeable to the Plaintiff, and yet he agreed, that if the Sheriff had made his Purſuit freſhly; although that at the turning of a Lane, end of an Houſe, or the like, the Priſoner had been out of the view of the Sheriff for a ſmall time, as until the Sheriff cometh to this Turning, end of the Houſe, or the like, yet the Sheriff may retake the Priſoner, and he ſhall be yet ſaid to be in Execution to the Party againſt his Will, yet when he is for ſo long a time out of his view, it ſhall be otherwiſe, for the Default which the Law preſumes to be in him; and therefore in this Caſe the Action lies. To which it was anſwered by Popham, Gawdey and Clench, that if he makes freſh Purſuit, ſo that it doth not appear fully that there was a Default in the Sheriff in his Purſuit, although he were ſo long out of his view, yet he ſhall be ſaid to be in Execution for the Party againſt his Will upon the re-taking of him: As if he be purſued to an Houſe where he is kept for a long time, and the Sheriff ſet a Guard upon the Houſe, and after this re-take him the next, or any other day without departing from thence, the Sheriff in ſuch a Caſe may re-take him upon his coming out of the Houſe, and he ſhall be in Execution to the Party againſt his own Will.

And ſo in all like Caſes; As if he purſues him in the night, ſo as he cannot ſee him, and yet by the Tract of the Houſe, or Enquiry he makes diligent Purſuit to re-take him, ſo that it cannot appear that there was any negligence or default in him in making Purſuit.

And it is not the form of the Pleading to alledge, that he purſued him freſhly, and had him always in his view until he re-took him, but only that he purſued him freſhly and took him in this freſh Purſuit, without ſaying any thing that he was in his view, and therefore his being out of the view of the Sheriff is not material in the Caſe, but the freſh purſuit, and the taking of him in this Purſuit.

Then Coke moved, that the Bar was not good, becauſe he doth not ſhew where he made the Purſuit, ſo that he might agree to anſwer that which is alledged by the Plaintiff, to wit, his being at large at London, and therefore the Bar not being good, Judgment ſhall be given againſt the Defendant for the Inſufficiency of his Bar: for a Repleader ſhall not be in caſe of Demurrer, as it hath been adjudged here very lately, and alſo in the Common Bench.

To which it was anſwered by the ſaid Juſtices, That if the Bar be inſufficient in matter, ſo that it may appear by it, that the Plaintiff hath ſufficient cauſe of Action, which in matter is not ſufficiently avoided by the Bar, Judgment ſhall be given for the Plaintiff upon the Bar, if the Replication be ſufficient, and no Repleader; but if the Bar be ſufficient for the matter and inſufficient for the form only, as it is here, there before the Statute of Eliz. for pleading there ſhall be a Repleader, but now becauſe no Demurrer was upon the Bar, but a Replication made to it, therefore by Popham no advantage ſhall be taken of the Bar for matter of form, which is admitted by the Party, and no advantage taken thereof according to the Statute.

And they all agreed, that the Sheriff, albeit he did not make freſh Purſuit upon the Eſcape, may yet take, and re-take the Priſoner who eſcaped from him out of Execution, for the Priſoner ſhall not take advantage to avoid the Execution; and therefore in reſpect of the Plaintiff, who yet may accept the Priſoner to be in Execution, the Sheriff may re-take the Priſoner. But if the Plaintiff had recovered againſt the Sheriff before for the Eſcape, then the Sheriff for his Indempnity cannot retake him, but is put to his Action upon the Caſe againſt the Priſoner, for the Sheriff hath no colour in ſuch a Caſe of Eſcape to retake him, but in reſpect, and for the advantage of the Plaintiff, who had Judgment againſt the Priſoner, and not in reſpect of the private Wrong done to himſelf, of which he hath no Judgment, and as it is now, the Replication not being good (by Popham) Judgment ought to be given againſt the Plaintiff. But by Aſſent it was ordered that the Defendant ſhall put in new Bail, and that upon it, he ſhall plead anew. But how ſhall it be if the Sheriff do not make freſh Suit and re-take him? And afterwards he, at whoſe Suit he was in Execution recovered againſt the Sheriff; may the Priſoner have an Audita querela upon the matter?

Upon an Aſſembly of all the Juſtices at Serjeants-Inn in Fleet-Street, with the Barons of the Exchequer, it was clearly agreed by them all (but two, who at the beginning made ſome doubt of it, but at the end aſſented alſo.)

If in the night, the Houſe of any be broken, with an intent to ſteal any thing being in the Houſe, although no Perſon be in the Houſe at this time, yet this is Burglary, for the Law is, that every one ſhall be in ſecurity in the night, as well for their Goods as their Perſons which be in the Houſe.

And if a Church be broken in the night for the ſtealing of any thing in it, this is Burglary, though no Perſon be in it at this time. And ſo hath the Law always been put in Execution, and in all the Books which ſpeak of Burglary, it is not mentioned that any Perſon ought to be in the Houſe, but that it is Burglary, the Meſſuage being broken in the night, to the intent to kill any Perſon there, or to the intent to ſteal any thing out of it.

And the Cauſe that of late time it hath been put in the Inditements of Burglary, that ſome Perſon was then there, &c. hath been, becauſe that in ſuch Caſes of Burglary, Clergy was taken away, but now by the Statute of 18 Eliz. Clergy is taken away in every Caſe of Burglary.

And the ancient Preſidents are, Quod domum of ſuch an one Noctanter Felonice & Burglariter fregit, without making mention that any Perſon was then in it, or making mention that it was Domus manſionalis of any: And it may be a Manſion Houſe, albeit no Perſon then inhabit in it. And agreed

that

that hereafter it shall be so put in Execution by all the Justices. See this more fully hereafter, Trin. 36 Eliz. Pl. 1. in this Book.

AT Tres Paschæ this Term there were made for Serjeants at Law; viz. Lewkenor, Savage and Williams of the Middle-Temple, Heale only of the Inner-Temple, Kingsmill, Warburton, Branthwaite and Flemming of Lincolns-Inn, and Daniel and Spurling of Grayes-Inn.

And all the Justices were assembled in the Middle-Temple-Hall, the Wednesday past Mensem Paschæ, being the second day of May, where the two Chief Justices, and Chief Baron sate upon the upper Bench of the same Hall, in their Scarlet Robes with their Collers of S. S. and every one of the other Justices and Barons in their Ancienty, one on the one side, and the other on the other side in their Scarlet Robes also, and then came the new Serjeants in their black Gowns before the Justices there, the two eldest being put in the midst before the Chief Justice of England, and so evere one of them, one on the one side, and the other on the other side, according to their Ancienty, and every one of the said Serjeants having one of his Servants behind him at his back, with his Master's Scarlet Hood and Coif upon his Arms: And thereupon the said Chief Justice made his Speech in this manner.

IF Men will enter into a due consideration upon what grounds the Laws of this Realm have their Original Foundation, and what good effects are wrought through the due Execution of the same, they might say, and that justly, that the Profession thereof is both an honest, and an honourable Profession.

The Laws are derived partly from the Law of God and partly from the Law of Nature. From the Law of God, in that it ordaineth means how the People may be truly instructed in the Knowledge and Fear of God: How they should demean themselves towards their Sovereign and Prince: How they ought to live one with the other, and how to be defended from Oppressions and Injuries. From the Law of Nature, in that it provideth how each Man may defend himself, that he may live by his own Labours, or otherwise according to his Profession or Calling; That he may secure his Posterity of that which he hath gathered together by his Industry, and that Man with Man may live together in such secure and comfortable Society as appertaineth. And what be the effects which grow by the due Execution of the Laws? They are these.

By it God is known, the Sovereign Prince obeyed, the People are kept to live in Peace, and that is yielded to each which is his due: And can there be any better things than these upon the face of the Earth? No, there cannot. The Law therefore being taken from so good a Ground, and working such notable and honourable Effects, who can justly say otherwise, but that the Profession of such a Law is an honourable Profession? Are not the Judges of the Law Professors of the Law? See then what God himself in his word hath said of Judges in *Psal.* 82. speaking of Judgment and Justices he saith thus; *I have said ye are Gods*, and can there be any higher name than this in Heaven or Earth? And why are they so learned? but for that, they in their Offices do resemble that which is the Office of God, as to discern so far forth as Man's Capacity can reach unto between Right and Wrong, Truth and Falshood, the Just and the Unjust, which is a most high, weighty and honourable Charge, and therefore, 2 *Chron.* 19. *Jehosophat* said to the Judges, *Take heed what ye do, for you do not execute the Judgments of Men, but of the Lord, and He will be with you in Judgment.* By which it is evident, that they are either grosly ignorant, or otherwise very malignant and contemptuous Persons that may not be induced to be reformed, that do in any wise hold the Profession to be either base or contemptible.

And this I may truly say to the Encouragement and Comfort of such as being honest do profess the Law; That in the most parts of *England* there are more Gentlemen's Houses, and those of Continuance raised and advanced by that

Profeſſion alone, than by all other the Profeſſions that can be ſpoken of, and approved.

Let any Man of Experience in the State, of the general part of the Realm enter into a due Conſideration of it, and I am well aſſured he ſhall find it ſo; whereby it may plainly appear, that God's Bleſſings for Worldly Benefits have greatly abounded towards ſuch as have walked evenly and juſtly in that Calling: yet happily there may be ſome (I mean ſuch as ſlip in by extraordinary means) that ſometimes do give Scandal to the Profeſſion; as where ſuch are called to the Degrees of Learning, as are either ignorant, or infamous Perſons, whereby they either cannot adviſe as they ſhould, or by giving themſelves over to Slights and to Shifts, they do not adviſe as they ought.

A matter abhorred of all good and honeſt Men: But the ſame being duly weighed, tendeth to the Touch of the Perſon, and not of the Profeſſion. Nevertheleſs to avoid this Scandal, I would adviſe;

1. Such as have Government in theſe Houſes of Court, ſhould be very careful and reſpective in their Calls, not only to the Bench as Readers, but of thoſe alſo whom they call to the Bar, that they may be ſuch as may appear to be both learned, and honeſt, and ſuch as may not juſtly be impeached of Ignorance, or Ignominy; for ſuch are not only to adviſe between Parties, but many of them are drawn to Credit and Government alſo in their Countries, and therefore behooffful to be free from ſuch Imputations.

And ſithence without the Knowledge of the Law in ſome meaſure, ſuch as govern in their Countries, may often fall to commit ſuch Errors as were to be withed might be otherwiſe.

It were convenient that Gentlemen, yea, thoſe of beſt Worth would bring up their very Heirs in the Knowledge of the Laws, as that they might in after Ages, when as they ſhall be called to Government, be ſo able to govern under Her Majeſty as might beſt ſtand with their Reputations, and the good of their Countries.

And now your ſelves that are here preſent, and have been called to this State and Degree of Serjeants at Law (a State and Degree I may well call it, for that Her Majeſty doth ſo term it) ſince your Gravities and your good Converſations in your Callings hitherto, and the good Opinion conceived of your Learnings, Experiences, and Diſcretions hath moved Her Majeſty to call you to this Dignity.

I am now to adviſe you ſo to demean and govern your ſelves in your Profeſſion as thoſe good things thus conceived of you may not henceforth any ways be blemiſhed, but rather increaſe, to your further Reputations and Credits. In which you are to have a ſpecial regard that you be thankful, firſt, to God, who hath ſo guided the Courſe of your Lives hitherto, as it hath made you to have been thought to have merited this Advancement. Then to Her Majeſty, who upon good Report made, hath conceived ſo well of you as to call you to this Degree, wherein it behoveth you ſo to demean your ſelves, as in all Her Highneſs Service, both in your Countries and otherwiſe, as you ſhall be called thereunto, as you may be found to deal therein effectually, diligently and juſtly.

And Laſtly, To the Country and Common-wealth who hath carried ſo good a Report of you, as thereby you have been rather brought to this place: And the moſt Thankfulneſs you can ſhew to your Country, is, to counſel your Clients according to your Skill honeſtly and truly, whereby they may not be encouraged to ſpend their Time and their Subſtance in vain, frivolous and unjuſt Suits, to be faithful and ſecret to your Clients, not diſcloſing their Counſels to their prejudice, that you expedite your Clients Cauſe ſo far forth with convenience, and your Clients ſafety, that both in your Practice and otherwiſe, your Speech and Behaviour towards all Men be modeſt and diſcreet, yea, ſuch as appertaineth to Men of your Gravities and Callings, that without reſpect of Perſons, ye be bold to maintain your Clients honeſt Cauſe, ſo far forth as may ſtand with Knowledge and Diſcretion: And that in all things you reſpect more your Honeſties, than your Profits.

And

And touching these Points, you have a continual Memory, and that always about you, in your very Garments: And therefore by the Coif, in respect it is white, many things are signified, as Gravity, Wisdom and Experience, for that these Vertues are proper to the gray Hairs, and white headed Men.

There is also signified thereby, that you should be both honest and of an unspotted life; And in that it is fashioned like an Helmet, it signifieth, that you should be both bold to utter your Knowledge in the Law, in the honest and just Cause of your Client, without respect of Persons whomsoever it concerneth. And by the party-colour'd Garments, being both of deep Colours, and such as the Judges themselves in ancient time used (for so we receive it by Tradition) is signified soundness and depth of Judgment and Ability to discern of Causes, what Colour soever be cast over it, and under, or with what Vail or Shadow soever it be disguised. For the wholeness and closeness of your Garments, they do signifie Integrity to be used in your Advices, and Secrecy in your Counsels. And in that the Garments being single and unlined, it betokeneth that you should be sincere and plain in your Advices, and not double, carrying your Opinion to your self one way, and you advise it your Client clean another way.

The two Tongues do signifie, that as you should have one Tongue for the Rich for your Fee, as a Reward for your long Studies and Labours, so should you also have another Tongue as ready without Reward to defend the Poor and Oppressed: And therein to shew your selves thankful to God for all that which he hath bestowed upon you.

And for the Rings you give, as Gold is amongst all Metals the purest, so should you be of all others of your Profession the perfectest both in Knowledge and in the other Vertues before remembred: And in that it is a Ring, and round without end, it betokeneth that you have made a perpetual Vow to this your Profession and Calling, and are as it were wedded unto it: And therefore I heartily wish you may always walk therein according as appertaineth to your Calling.

And this done, the ancient Serjeant beginneth to recite his Pleading, and so each after other in order.

And that done, the ancientest kneeleth down before the Chief Justice of England, and so the rest before the Justices and Barons as they are in Ancienty, and had severally by the said Chief Justice their Coifs put upon their Heads, and then their red Hoods upon their Shoulders, and then the Serjeants return to their Chambers, and put on their party-coloured Garments, and so walk on to Westminster the one after the other, as they be in Ancienty, bare-headed, with all their Coifs on, and so are in their turn presented the one after the other, by two of the ancientest Serjeants: And after their Pleadings recited, they give their Rings in the Court by some Friends, and so are thereupon set in their place at the Bar according to their Ancienty.

And all this done, they return to their Chambers, and there put on their black Gowns, and red Hoods, and come into the Hall each standing at his Table according to his Ancienty bare-headed, with his Coif on, and after setteth himself upon the Bench, having a whole Mess of Meat, with two Courses of many Dishes served unto him; And in the Afternoon they put on their Purple Gowns, and then go in order to Paul's, where it hath been accustomed that they heard Service, and had a Sermon.

Edwards

Edwards *versus* Halinder.

4. IN an Action upon the Case by Rice Edwards against Edward Halinder; The Plaintiff declared by his Bill that one Edward Baniſter was ſeiſed in his Demeſn as of Fee, of a Meſſuage in ſuch a Pariſh and Ward in London, and being ſo ſeiſed did let to him the Cellar of the ſame Houſe the 23d day of April, 32 Eliz. for a week, from the ſame day, and ſo from week to week, ſo long as the Parties ſhould pleaſe, at ſuch a Rent by the week whereby he was poſſeſſed.

And further, that the ſaid Edward Baniſter being ſeiſed of the ſaid Houſe, as is aforeſaid, afterwards, to wit, 29 July, in the 32d year aforeſaid, gave to the ſaid Defendant Officium, Anglice, the Ware-houſe of the ſaid Meſſuage being right over the ſaid Cellar, for a week from thenceforth, and ſo from week to week, ſo long as the Parties ſhould pleaſe, paying ſuch a Rent, whereby the Defendant was thereof poſſeſſed accordingly: And the Plaintiff being poſſeſſed of the ſaid Cellar, and the Defendant of the Ware-houſe, as aforeſaid, and the Plaintiff then having in the ſaid Cellar three Buts of Sack to the value of 40 l. &c. The Defendant the 30th day of July in the 32d year aforeſaid, put ſuch a quantity of weight and burthen of Merchandize into the ſaid Ware-houſe, and thereby did ſo over-burthen the Flor of the ſaid Ware-houſe, ſo that by the force and weight of the ſaid burthen, the ſaid Flor the ſaid 30th day of July was broken, and by force thereof did fall, and that thereby the Merchandize that were in the ſaid Ware-houſe did fall out of the ſaid Ware-houſe into the ſaid Cellar upon the ſaid Veſſels of Wine, and by force thereof brake the ſaid Veſſels of Wine, whereby the ſaid Wine did fly out of the ſaid Veſſels, and became of no value, to the Plaintiff's Damage of an hundred Pounds, &c. To which the Defendant ſaith, That within a ſmall time before the Treſpaſs committed, the Floor of the ſaid Ware-houſe ſuſtained as great a burthen of Merchandize as this was: And that the Ware-houſe was demiſed to him as the Plaintiff hath alledged to lay in 30 Tun weight, whereby he was poſſeſſed, and ſo poſſeſſed the ſaid 30th day of *July*, did put into the ſaid Ware-houſe but 14 Tun weight of Merchandize, and that the Damages which the Plaintiff had by the breaking of the Floor, was, becauſe the Floor at the time of the laying of the Merchandize upon it, and alſo before the Leaſe made to him thereof was ſo rotten, and a great part of the Wall upon which the ſaid Floor lies, ſo much decayed, that for default of Reparations and ſupporting thereof by thoſe to whom the Reparations did belong, before the Leaſe thereof made, it ſuddenly brake, which matter he is ready to aver. Whereupon the Plaintiff demurred, and Judgment was given for the Plaintiff in the Exchequer, upon which a Writ of Error was brought in the Exchequer-Chamber, and the Error aſſigned was, that the Judgment ought to have been given for the Defendant, becauſe that now it appeareth that there was not any default in the Defendant, for he was not to repair that which was ſo ruinous at the time of his Leaſe, and therefore if it did bear ſo much lately before, it cannot fall by the Default of the Defendant in the weight put upon it, but by the ruinouſneſs of the thing demiſed; and yet by the Advice of the Juſtices the Judgment was this Term affirmed: for the Plaintiff hath alledged expreſly that the Flor brake by the weight of the Merchandize put upon it, which ought to be confeſſed and avoided, or traverſed; whereas here he anſwers but Argumentatively, to wit, that it did bear more before, therefore that he did not break it by this weight, or that it was ſo ruinous that it brake, Ergo not by the weight: whereas here it is expreſly alledged, that it brake by the weight put upon it, and if leſſer weight had been put it would not have broken. And he who takes ſuch a ruinous Houſe ought to mind well what weight he put into it at his peril, ſo that it be not ſo much that another ſhall take

take any damage by it: But if it had fallen of it self without any weight put upon it, or that it had fallen by the default only of the Posts in the Cellar which support the Flor, with which the Defendant had nothing to do, there the Defendant shall be excused; But here it is expressly alledged, that it fell by the weight put upon it, which ought to be answered: As if a Man take an Estate for life, or years in a ruinous House, if he pull it down he shall be charged in Waste, but if it fall of it self, he shall be excused in Waste; so there is a diversity where default is in the Party, and where not, so here, the Defendant ought to have taken good care, that he did not put upon such a ruinous Flor more than it might well bear, and if it would not bear any thing, he ought not to put any thing into it, to the prejudice of a third Person, and if he does, he shall answer to the Party his Damages.

Collard *versus* Collard.

5. IN an Ejectione firmæ brought by Constantine Collard against Richard Collard, the Case appeared to be this; Thomas Collard was seised in his Demesn as of Fee, of Lands in Winkle in the County of Devon, called the Barton of Southcote: And having two Sons, to wit, Eustace the eldest, and Richard (the now Defendant) the youngest, and the eldest being to be married, the said Thomas in consideration of this Marriage, being upon the said Barton, said these words.

Eustace stand forth, I do here, reserving an Estate for my own life and my Wives life, give unto thee and thy Heirs for ever these my Lands, and Barton of Southcote; after which the said Thomas enfeoffed his youngest Son of Barton, with Warranty from him and his Heirs, the eldest Son enters, and let to the Plaintiff, upon whom the Defendant re-enters, upon which Re-entry the Action was brought, and upon a special Verdict all this matter appeared: But it was found by the Verdict, that the said Thomas Collard the Father was dead, and therefore the Warranty was not any thing in the Case. And it was moved by Heale that the Plaintiff ought to be barred, because it did not pass by way of Estate, in as much as a Man cannot pass a Free-hold of a Land from himself to begin at a time to come, and by it to create a particular Estate to himself, and in Use it cannot pass, because that by a bare Parol an Use cannot be raised, and by giving my Land to my Son, Cousin, and the like, nothing will pass without Livery, for there is not Consideration to raise an Use.

Fennor. The words shall be taken, as if he had said (here I give you this Barton reserving an Estate for my life) although the words of Reservation have Priority in their time for the speaking of them, because a Reservation cannot be but out of a thing granted, and therefore the Reservation shall be utterly void, or otherwise ought to be taken according to their proper nature, to wit, to be in their Operation subsequent, and so shall not hurt the Grant, and therefore are not to be compared to the Case where a Man grant that after the death of I. S. or after his own death a Stranger shall have his Land, which Popham granted.

And Fennor said further, that these words being spoken upon the Land, as before, amount to a Livery.

Gawdy said, That the words as they are spoken amount to a Livery, if the words are sufficient to pass the Estate, but he conceived that the words are not sufficient to make the Estate to pass to the said Eustace, because his intent appeareth, that Eustace was not to have the Land until after the death of him and his Wife, and therefore of the same effect, as if he had granted the Land to the said Eustace after his death; and as an Use it cannot pass, because by a bare word an Use cannot be raised, as appeareth in divers Reports.

Mich.

Mich. 12 & 13 Eliz. which is a good Case to this purpose: But to say generally that an Use cannot be raised or charged upon a perfect Contract by words upon good consideration, cannot be Law; and therefore it is to be considered what the Law was before the Statute of 27 H. 8. And I think that none will deny, but that by Grant of Land for Money, before this Statute an Use was raised out of the same Land, for a Bargain and Sale of Land for Money, and a Grant of Land for Money is all one, and no difference between them: And is not a Grant of Land made in consideration of Marriage of my Son and Daughter, as valuable as a Grant of it for Money? It is clear that it is, and much more valuable, as my Blood is more valuable to me than my Money; and therefore it is absurd to say, that the Consideration of Money may raise or change an Use at Common Law, and not such a Consideration of Marriage.

And in such a Case at Common Law there was not any diversity, that the Party who so grant or bargain for the one or the other Considerations was seised of the Land granted, or bargained in Use, or Possession, but that the Use by the Contract was transferred according to the Bargain in both Cases where there is a Consideration: And where through all the Law shall it be seen that if any thing which might pass by Contract, there need any other thing than the words which make the Contract, as Writing or the like testifying it? And that the Law was so, it appeareth by the Statute of Inrolments of Bargains and Sales of Land made, 27 H. 8. which enacts, that no Freehold, nor Use thereof shall pass by Bargain and Sale only, unless it be by Deed indented and enrolled according to the Statute; Ergo, if this Statute had not been, it had passed by the Bargain and Sale by bare words; and in as much as the Statute enacts this in the Case of Bargain and Sale only, the other Cases, as this Case here, are as it was before at Common Law. And by an Exception at the end of the same Statute, London is as it was at Common Law, and therefore now Lands may pass there at this day by Bargain and Sale, by word without deed, for it is out of the Statute: And how can we say, that the Statute of Uses does any thing to alter the Common Law in this point, by any intent of the Makers thereof, whereas at the same Parliament they made an especial Law in the Case of Bargain and Sale of Lands. And at this day, for the Lands in London, notwithstanding the Statute of Uses, the Law hath been put in practice, and always holden as to the Lands there to be good, if sold by bare Parol as it were at Common Law. And I have heard it reported by Manwood late Chief Baron of the Exchequer, that it was in question in the time of King Edw. the 6th, whether the Use of a Free-hold of Land will pass upon a Contract by Parol without Deed in Consideration of Marriage; upon which all the then Justices were assembled upon a Doubt rising in a Case, happening in the Star-chamber, and then resolved by all the Justices (as he said) that it shall pass; and he said, that himself was of this Opinion also: And to say, that by Grant of Land at Common Law, the Use had been raised out of the Possessions of the Land which the Grantor then had, and by it to pass to the Bargainee, and that it shall not be raised and passed to another by Grant of Land in Consideration of Marriage, which is a more valuable Consideration than Money, is absurd and against all reason.

And for the Solemnity, Uses in such Cases (in respect of Marriage) were the cause that they always were left as they were at Common Law, and not restrained as the Case of Bargain and Sale is, which by common intendment may be made more easily and secretly, than that which is done in Consideration of Marriage, which is always a thing publick and notorious, but it is not reasonable that every slight or accidental Speech shall make an Alteration of any Use: As if a Man ask of any one what he will give or leave to any of his Sons or Daughters for their Advancement in Marriage, or otherwise for their Advancement, this shall be but as a bare Speech or Communi-

cation,

cation which shall not alter or change any Use: But where there is upon the Speech a Conclusion of a Marriage betwæn the Friends of the Parties themselves, and that in Consideration thereof they shall have such Lands, and for such an Estate, there the Use shall be raised by it, and shall pass accordingly to the Parties, according to the Conclusion which Fennor granted.

But by Popham, If it may be taken upon the words spoken, that the purpose was to have the Estate pass by way of making of an Estate, as by way of Feoffment, &c. then notwithstanding the Consideration expressed, the Use shall not change, nor no Estate by it but at Will, until the Livery made thereupon: And therefore if a Man make a Deed of Feoffment, with express Consideration of Marriage, although the Deed hath words in it of Dedi & Concessi, with a Letter of Attorney to make Livery thereupon, there until Livery made nothing pass but at Will, because that by the Warrant of Attorney, it appeareth the full intent of the Parties was, that it shall pass by way of Feoffment, and not otherwise, if it be of Land in Possession: And if it be of Land in Lease, not until Attornment of Tenants, which was granted by all the Justices.

But if a Man in Consideration of Money makes a Deed of Gift, Grant, Bargain and Sale of his Lands to another, and his Heirs by Deed indented, with a Letter of Attorney to make Livery, if Livery be thereupon made before Inrolment, there it hath bæn adjudged to pass by the Livery, and not by the Inrolment.

But by Popham, where Land is to pass in Possession by Estate executed, two things are requisite: The one, the Grant of the said Land, the other, the Livery to be made thereupon, for by the bare Grant without Livery, it doth not pass as by way of making of an Estate: And this is the cause that such Solemnity hath bæn used in Liveries, to wit, if it were of a Messuage, to have the people out of it, and then to give Seisin to the Party by the Ring of the Door of the House, and of Land by a Turf, and a Twig, and the like, which may be notorious: Yet I agree it shall be a good Livery to say to the Party, Here is the Land, enter into it, and take it to you and your Heirs for ever, or for Life, or in Tail, as the Case is; And albeit Livery by the View may be made in such manner, yet by the sealing of the Deed of Grant upon the Land, or by Grant of it upon the Land without Livery, nothing pass but at Will. But if thereupon one Party saith to the other after the Grant, or upon it, Here is the Land, enter upon it, and take it according to the Grant, this is a good Livery: But he ought to say this, or something which amounts to so much, or otherwise it shall not pass by the bare Grant of the Land, although it be made upon the Land. Clench said, That when Thomas said to Eustace, Stand forth here I do give to thee and thine Heirs these Lands, this amounts to a Grant and a Livery also; and by the words of the Reservation of the Estate to himself, and his Wife for their lives, in this the Law shall make an Use in the said Thomas and his Wife for their lives: so that by such means it shall enure, as if he had reserved the Use thereof to him and his Wife, and so it shall enure to them as it may by the Law according to his intent, without doing prejudice to the Estate passed to the said Eustace: And afterwards, Term Mich. 36 & 37 Eliz. The Case was again disputed amongst the Justices, and then Popham said, That the Case of Bargains and Sales of Land in Cities, as London, &c. as appeareth in Dyer, 6 Eliz. are as they were at Common Law; To which all the Justices agreed, and therefore shall pass by Bargain by Parol, without Writing. And by Baynton's Case in 6 & 7 Eliz. it is admitted of every side, that an Use was raised out of a Possession at Common Law by Bargain and Sale by Parol, for otherwise, to what purpose was the Statute of Inrolments, and by the same Case it is also admitted now to pass by Parol upon a full Agreement by words in Consideration of Marriage, or the Continuance of Name, or Blood.

For it is agreed there, that the Conſideration of Nature is the moſt forreable Conſideration which can be, and agreed alſo that a bare Covenant by Writing without Conſideration, will not change an Uſe, therefore the force thereof is in the Conſideration, of which the Law hath great reſpect: And therefore the Son and Heir Apparent ex aſſenſu patris, only may at the Dore of the Church endow his Wife of his Father's Land, which he hath in Fee, and this is good by Littleton, although the Son hath nothing in it, whereby an Eſtate paſs to the Wife, which is more than an Uſe. Nature is of ſo ſtrong conſideration in the Law; And thereupon after Advice, Judgment was given for the Plaintiff: the Roll of this appeareth in Banco Regis, 1 Hil. 35 Eliz. Rot. 355. And upon this Judgment a Writ of Error was brought, and the Judgment aforeſaid reverſed in the point of Judgment in the Exchequer, by the Statute of 27 Eliz.

Kettle *verſus* Maſon *and* Eſterby.

Vide this Caſe *Coke*, lib. 1. 146, *&c.*

6. IN a ſecond Deliverance between John Kettle Plaintiff, and George Maſon and Francis Eſterby, Avowants, the Caſe appeared to be this: Thomas May was ſeiſed of the Mannor of Sawters and Hawlin, in the County of Kent, in his Demeſn as of Fee, and being ſo thereof ſeiſed, enfeoffed Thomas Scot and John Fremling and their Heirs, to the uſe of Dennis May his Son and Heir Apparent and his Heirs, upon condition, that the ſaid Dennis and his Heirs ſhould pay to one Petronell Martin for his life, an Annual Rent of 10 l. which the ſaid Thomas had before granted to the ſaid Petronel, to begin upon the death of the ſaid Thomas; And upon condition alſo, that the ſaid Thomas upon the Payment of 10 s. by him to the ſaid Feoffees, or any of them, &c. might re-enter: After which the ſaid Thomas May and Dennis by their Deed dated 30 May, 19 Eliz. granted a Rent-charge out of the ſaid Mannor of 20 l. a year to one Anne May for her life, after which the ſaid Thomas May paid the ſaid 10 s. to the ſaid Feoffees in performance of the Condition aforeſaid, and thereupon re-entred into the Land and enfeoffed a Stranger: And whether by this the Rent were defeated, was the Queſtion: And it was moved by Coke Attorney-general that it was not, but that in reſpect that he joyned in the part, it ſhall enure againſt the ſaid Thomas by way of Confirmation, which ſhall bind him as well againſt this matter of Condition, as it ſhall do againſt any Right which the ſaid Thomas otherwiſe had. And therefore by Littleton, if a Diſſeiſor make a Leaſe for years, or grant a Rent-charge, and the Diſſeiſee confirm them, and afterwards re-enters; albeit Littleton there makes a Quære of it, yet Coke ſaid, That the Diſſeiſee ſhould not avoid the Charge, or Leaſe which was granted by the whole Court. And by him the Opinion is in P. 11. H. 7. 21. If Tenant in Tail makes a Feoffment to his own uſe upon Condition, and afterwards is bound in a Statute, upon which Execution is ſued, and afterwards he re-enter for the Condition broken, he ſhall not avoid the Execuion, no more the Rent here.

Fennor agreed with Coke, and ſaid further, That in as much as every one who have Title and Intereſt have joyned in the Grant, it remains perpetually good.

And therefore if a Parſon at Common Law had granted a Rent-charge out of his Rectory, being confirmed by the Patron and Ordinary, it ſhall be good in perpetuity, and yet the Parſon alone could not have charged it, and the Patron and Ordinary have no intereſt to charge it, but in as much as all who have to intermeddle therein are Parties to it, or have given their Aſſent to it, it ſufficeth.

Gawdy was of the ſame Opinion, and ſaid, That there is no Land but by ſome means or other it might be charged, and therefore if Tenant for life grant a Rent-

a Rent-charge in Fee, and he in the Reverſion confirm the Grant, per Littleton, the Grant is good in Property, ſo here.

To which Clench alſo aſſented, but Popham ſaid, That by the Entry for the Condition, the Charge is defeated: And therefore we are to conſider upon the Ground of Littleton in his Chapter of Confirmation, to what effect a Confirmation ſhall enure, and this is to bind the Right of him who makes the Confirmation, but not to alter the nature of the Eſtate of him to whom the Confirmation is made; And therefore in the Caſe of a Grant of a Rent-charge by the Diſſeiſor, which is confirmed by the Demiſee: the reaſon why the Confirmation ſhall make this good, is, becauſe that as the Diſſeiſee hath Right to defeat the Right and the Eſtate of the Diſſeiſor by his Regreſs, in the ſame manner hath he Right thereby to avoid a Charge, or a Leaſe granted by the Diſſeiſor, which Right for the time may be bound by his Confirmation. But when a Man hath an Eſtate upon Condition, although the Feoffor, or his Heirs confirm this Eſtate, yet by this the Eſtate is not altered as to the Condition, but it always remaineth, and therefore Nihil operatur by ſuch a Confirmation to prejudice the Condition. And ſo there is a great diverſity, when he who confirmeth hath Right to the Land, and where but a Condition in the Land. And by him, if a Feoffee upon Condition make a Feoffment over, or a Leaſe for life or years, every one of theſe have their Eſtates ſubject to the Condition; and therefore by a Confirmation made to them, none can be excluded from the Condition: And the ſame Reaſon is in caſe of a Rent granted by a Feoffor upon Condition, it is alſo ſubject to the Condition, and therefore not excluded from it by the Confirmation, as it ſhall be in caſe of a Right.

And to prove this Diverſity, ſuppoſe there be Grand-father, Father and Son, the Father diſſeiſe the Grand-father, and makes a Feoffment upon Condition, and dies, after which the Grand-father dies, now the Son confirms the Eſtate of the Feoffee, by this he hath excluded himſelf from the Right which deſcended to him by his Grand-father, but not to the Condition which deſcended to him from his Father.

And of this Opinion were Anderſon and other Juſtices at Serjeants Inn in Fleet-Street, for the principal Caſe upon the Caſe moved there, by Popham this Term: And as the Caſe is, it would have made a good Queſtion upon the Statute of Fraudulent Conveyances, if the Avowry had been made as by the Grant of Thomas May, in as much as the Eſtate made to the uſe of Dennis, was defeaſable at the pleaſure of the ſaid Thomas, in as much as it was made by the Tenant of the Land, as well as by him who made the Conveyance, which is to be judged fraudulent upon the Statute. But this as the Pleading was, cannot come in queſtion in this Caſe: and afterwards by the Opinion of other three Judges, Judgment was given that the Grant ſhould bind the ſaid Thomas May, and his Feoffees after him, notwithſtanding his Regreſs made by the Condition, in as much as the Grant of the ſaid Thomas ſhall enure to the Grantee by way of Confirmation.

And by Gawdey, If a Feoffee upon Condition make a Feoffment over, and the firſt Feoffor confirm the Eſtate of the laſt Feoffee, he ſhall hold the Land diſcharged of the Condition, becauſe his Feoffment was made abſolutely without any Condition expreſſed in his Feoffment.

But Popham denied this, as it appeareth by Littleton Tit. Deſcents, becauſe he hath his Eſtate ſubject to the ſame Condition, and in the ſame manner as his Feoffor hath it, into whomſoever Hands it happeneth to come, and therefore the Confirmation ſhall not diſcharge the Condition, but is only to bind the Right of him who made it in the Poſſeſſion of him to whom it is made but not upon Condition.

Morgan's *Case.*

7. ROBERT Morgan Eſquire, being ſeiſed in his Demeſn as of Fee, of certain Lands called Wanſter Tenements in Socage, having Iſſue John his eldeſt Son, Chriſtopher his ſecond Son, and William his youngeſt Son; by his laſt Will in writing, demiſed to the ſaid Chriſtopher and Willam thus; viz. Joyntly and ſeverally for their lives, ſo that neither of them ſhall alienate the Lands, and if they do, that they ſhall remain to his Heirs. Robert the Father dies, and afterwards John his Son and Heir dies without Iſſue, the Reverſion by this deſcends to the ſaid Chriſtopher, who dies, leaving Iſſue. And upon this Caſe made in the Court of Wards, the two Chief Juſtices Popham and Anderſon agreed firſt, That upon the deviſe and death of the Father, the ſaid Chriſtopher and William were Joynt-Tenants of the Land, and not Tenants in Common, notwithſtanding the word (ſeverally) becauſe it is coupled with the ſaid word (joyntly.) But yet they agreed alſo, that by the Deſcent from John to Chriſtopher, the Fee-ſimple was executed in the ſaid Chriſtopher, for the Poyety in the ſame Manor, as if he had purchaſed the Reverſion of the whole, or of this Poyety, and that it is not like to the Caſe where Land is given to two, and to the Heirs of one of them; in which Caſe for the benefit of the Survivorſhip, it is not executed to divide the Joynture, becauſe the Eſtates are made at one and the ſame together, and therefore not like to the Caſe where the Inheritance cometh to the particular Eſtate by ſeveral and divided means: And a Decree was made accordingly.

Trin. 36 *Eliz.* in the *King's Bench.*

1. IT was agreed by all the Juſtices and Barons of the Exchequer, upon an Aſſembly made at Serjeants-Inn, after ſearch made for the ancient Preſidents, and upon good deliberation taken.

If a Man have two Houſes, and inhabit ſometimes in one, and ſometimes in the other, if that Houſe in which he doth not then inhabit be broken in the night, to the intent to ſteal the Goods then ding in his Houſe, that this is Burglary, although no Perſon be then in the Houſe, and that now by the new Statute made, ſuch an Offender ſhall not have his Clergy, for before the Statutes were made, which take away Clergy in caſe of Burglary, where any perſon was put in fear, no mention was made in the Indictment of Burglary, that any Perſon was in the Houſe: But it was general that the Houſe of ſuch an one Noctanter fregit, and ſuch Goods then there Felonice cepit. And the breaking of a Church in the night to ſteal the Goods, there is Burglary, although no Perſon be in it, becauſe this is the place to keep the Goods of the Pariſh. And in the ſame manner the Houſe of every one is the proper place to preſerve his Goods, although no Perſon be there: And that the Law was always ſo, it is to be collected by the Courſe of the Statutes thereof made. For firſt the Statute of 23 H. 8. doth not take Clergy from any in caſe of Burglary, unleſs ſome of the ſame Family be in the Houſe, and put in fear. And in 5 Eliz. 6. The Offender ſhall be outed of his Clergy, if any of the Family be in the Houſe, be they ſleeping or waking. And theſe Statutes were the cauſe that it was uſed of late time, to put in the Indictments of Burglary, that ſome Perſon of the Family was then in the Houſe, to put them from their Clergy. But this doth not prove that it ſhall not be Burglary, but where ſome Perſon was in the Houſe, and by 18 Eliz. Clergy is taken away in all caſes of Burglary generally, without making mention of any Perſon

Perſon to be there, which enforce the Reſolution aforeſaid, and according to it, they all agreed hereafter to put it in Execution.

Finch *verſus* Riſeley.

2. IN this Term the Caſe between Finch and Riſeley was in queſtion before all the Juſtices and Barons for this aſſembled at Serjeants Inn in Fleet-ſtreet, where after Arguments heard by the Council of the Parties upon this point only.

If the Queen make a Leaſe for years, rendring Rent, with a Proviſo, that the Rent be not paid at the day limited, that the Leaſe ſhall ceaſe without making mention that it was to be paid at the Receipt, whether the Leaſe ſhall ceaſe upon the default of Payment, before Office found thereof.

And by Periam and ſome of the Juſtices, the Leaſe ſhall not ceaſe until an Office be found of the Default, becauſe it is a matter in Fait which determines it, to wit, the Not-payment.

And by Gawdey, it ſhall be taken as if it had been for the Not-payment, that the Proviſo had been that the Leaſe ſhould be forfeited: In which caſe it is not determined until Re-entry made for the Forfeiture, which in the Quæns Caſe ought always to be by Office, which countervails the Re-entry of a common Perſon, As where the Quæn makes a Leaſe rendring Rent, and for default of Payment a Re-entry, albeit the Rent be not paid, yet until Office found thereof the Rent continues.

Popham, Anderſon, and the greater part of the Juſtices and Barons reſolved that it was clear in this caſe, that Ipſo facto upon the default of Payment, the Leaſe was determined, according to the very purport of the Contract, beyond which it cannot have any being, and therefore there needs no Office in the caſe. But where it is that it ſhall be forfeited, or that he ſhall re-enter, there until advantage taken of the Forfeiture in the one caſe, or until Re-entry made in the other caſe, the Term always continues by the Contract: And where in the caſe of a common Perſon, there is need of a Re-entry to undo the Eſtate, there in the Caſe of the King there needs an Office to determine the Eſtate, for an Office in the King's Caſe countervails an Entry, for the King in Perſon cannot make the Entry: And upon this Reſolution of the greater part of the Juſtices in Mich. Term, 31 & 32 Eliz. the ſame Caſe was in queſtion in the Office of Pleas in the Exchequer, between the ſaid Moyl Finch Plaintiff, and Thomas Throgmorton, and others, Defendants, and there adjudged by Manwood late Chief Baron, and all the other Barons unanimouſly after long Argument at the Bar and Bench, that the Leaſe was void upon default of Payment of the Rent according to the Proviſo of the Leaſe, and this immediately without Office for the Reaſons before remembred; upon which Judgment was given, a Writ of Error was brought before the Lord Keeper of the great Seal, and the Lord Treaſurer of England, where it long depended, and after many Arguments, the Judgment given in the Exchequer by the Advice of Popham and Anderſon was affirmed, and that upon this reaſon, for the Proviſo ſhall be taken to be a Limitation to determine the Eſtate, and not a Condition to undo the Eſtate, which cannot be defeated in caſe of a Condition, but by Entry in caſe of a common Perſon, and but by Office (which countervails an Entry) in the Caſe of the Queen. And this Judgment was ſo affirmed in Mich. Term, 36 & 37 Eliz.

Smith's *Caſe*.

3. IT was found by Diem clauſit extremum, after the death of Richard Smith, that in conſideration of a Marriage to be had between Margaret Smith, and William Littleton a younger Son to Sir John Littleton Knight, and

and of 1300 Marks paid by the said Sir John to the said Richard, he made Assurance by Fine of his Lands (being 174 l. a year) viz. Of part thereof of the value of 123 l. a year, of which part was was holden of the Queen by Knights Service in Capite, to the use of himself for his life, and after his decease to the use of the said William and Margaret, and the Heirs of the Body of the said William, begotten on the Body of the said Margaret, and for default of such Issue, to the use of the right Heirs of the said William. And of the Residue thereof, being also holden in Capite of the Queen, to the use of himself for his life, and after his decease to the use of the first Issue Male of the said Richard, and to the Heirs Males of his Body, and then to other Issues of his Body, and for default of such Issue, to the said William and Margaret, and the Heirs of the Body of the said William, on the Body of the said Margaret, lawfully begotten, and for default of such Issue, to the right Heirs of the said William, with this Proviso, That it shall be lawful for the said Richard to make a Joynture to his Wife of the Lands limited to his Issue Males. and for making of Leases for 21 years, or three Lives, for any part of the said Land, rendring the ancient Rent, except of certain parcels, and that William died without Issue, and that Gilbert Littleton was his Brother and Heir, and that the said Margaret married the said George Littleton youngest Brother to the said William, which are yet living: And that the said Richard married Dorothy, and made her a Joynture according to the Proviso: And that the said Richard had Issue John Smith, and died, the said John being his Son and Heir, and within Age.

After which, a Melius inquirendum issued, by which it was found, that the said Margaret was the Daughter of the said Richard, and that the said Land was of the value of 12000 l. at the time of the Assurance: And how much of the Land shall be in ward, and what Land, and what the Melius inquirendum makes in the Case, was the Question put to the two Chief Justices, Popham and Anderson, who agreed that the Queen now shall have the third part, as well of that which was assured to William and Margaret, immediately after the death of the said Richard, as of that which was limited to Dorothy for the life of the said Margaret, for although Money were paid, yet this was not the only Consideration why the Lands were assured, but the Advancement of the Daughter, and now by the surviving of the said Margaret, she shall be said to be in the whole, which was assured to her by her Father, and for her Advancement, and the Land (as it appears) was of greater value than the Money given, and may as well be thought to be given for the Remainder of the Fee. And agreeable to this was the Case of Coffin of Devonshire, about the beginning of the Reign of the now Queen, which was that the said Coffin for Moneys paid by one Coffin his Cousin (having but Daughters himself) conveyed his Land to the use of himself and his Wife, and to the Heirs Males of his Body, and for default of such Issue, to the use of his said Cousin and his Heirs, for which his said Cousin was to give a certain Sum of Money to the Daughters for their Marriage: Coffin dies, his said Daughters being his Heirs and within Age, and were in Ward to the Queen, the Lands being holden by Knights Service in Capite: And the third part of the Land was taken from the Wife of Coffin for the life of the said Wife, if the Heir continue so long in Ward.

And it was also agreed by them and the Council of the Court, that the Melius inquirendum was well awarded, to certifie that the said Margaret was the Daughter of the said Richard, at which the Court could not otherwise well take Conusance, for they thought that it was not matter to come in by the Averment of the Attorney-general, as Dyer hath reported it: But now by the Statute, it ought to be found by Inquisition, and being a thing which stands with the former Inquisition, it ought to be supplied by the Melius inquirendum: for the same Statute which gives the Wardship in case where

Land

Land is conveyed for the advancement of the Wife, or Infants, or for the ſatisfaction of Debts and Legacies of the Party by the implication of the ſame Statute, this may be found by Inquiſition; and if it be omitted in the Inquiſition, it ought to be found by a Melius inquirendum, but not to come in by a bare Surmiſe. And therefore if in the Inquiſition it be found, that the Anceſtor had conveyed his Land by the Melius inquirendum, it may be found that it was for the Payment of his Debts or Legacies, or that the Party to whom, or to whoſe uſe it was made, was the Son, or Wife of the Party that made it, and that by the very purport of the Statute, 32 & 34 H. 8. as by Fitzherbert, if it be ſurmiſed, that the Land is of greater value then it is found, a Melius inquirendum ſhall iſſue, and ſo ſhall it be if it be found that one is Heir of the part of the Mother, but they know not who is Heir of the part of the Father; ſo if it be not found what Eſtate the Tenant had, or of whom the Land was holden: ſo upon Surmiſe made, that he is ſeiſed of ſome other Eſtate, or that he held it by other Services, by Fitzherbert a Melius inquirendum ſhall Iſſue, and upon this Order given, it was decreed accordingly this Term.

Morgan *verſus* Tedcaſtle.

4. IN the ſame Term upon matter of Arbitrement between Morgan and Tedcaſtle, touching certain Lands at Welburn, in the County of Lincoln, put to Popham, Walmſley and Ewens Baron of the Exchequer: Whereas Morgan had granted to Tedcaſtle an 100 Acres of Land in ſuch a Field, and 60 in ſuch a Field, and 20 Acres of Meadow in ſuch a Meadow in Welburn and Hanſtead, in which the Acres are known by Eſtimation or Limits, there he ſhall take the Acres as they are known in the ſame places, be they more or leſs than the Statute, for they paſs as they are there known, and not according to the Meaſure by the Statute, But if I have a great Cloſe, containing twenty Acres of Land by Eſtimation, which is not 18, and I grant 10 Acres of the ſame Cloſe to another, there he ſhall have them, according to the Meaſure by the Statute, becauſe the Acres of ſuch a Cloſe are not known by Parcels, or by Meets and Bounds, and ſo it differeth from the firſt Caſe: And upon the Caſe then put to Anderſon, Brian and Fennor, they were of the ſame Opinion: Quod Nota.

Humble *verſus* Oliver.

5. IN Debt by Richard Humble againſt William Oliver, for a Rent reſerved upon a Leaſe for years, the Caſe was this; Thomas Plain was ſeiſed in his Demeſn as of Fee, of a Meſſuage in S. and ſo ſeiſed, did let it to the Defendant for divers years yet to come, rendring Rent payable at four uſual Feaſts of the year, the Leſſee entred accordingly, after which the ſaid Plain by Bargain and Sale enrolled, conveyed the Reverſion thereof to the ſaid Humble and his Heirs, and before the Feaſt of the Annunciation of our Lady, 35 Eliz. to wit, the 1ſt day of February, in the ſame year the ſaid Oliver aſſigned over his whole Term to one Southmead, who before the ſame Feaſt entred accordingly, and for the Rent due at the Feaſt of the Annunciation of our Lady, the Plaintiff brought this Action: And it was agreed by the whole Court that the Action would not lie againſt him; for although Plain (if he had not alienes the Reverſion over) might have had this Action againſt the ſaid Oliver, notwithſtanding that he had aſſigned over his Term before, for the privity of Contract which was between them, in as much as they were Parties to it of either part, yet the Grantee of the Reverſion ſhall not

not have advantage of the privity, he being a méer Stranger to the Contract, and now was but privy in Law by the Bargain, and therefore now he hath no Remedy but against him who had the Estate at the time when the Rent hapned to be due: and this is Southmead, and not Oliver. The Roll of this Case is in the King's Bench, Hil. 36 Eliz. Rot. 420.

Mich. 36 & 37 Eliz, In the King's Bench.

Button *versus* Wrightman.

Bor. Rep: Part, 10. P. 124. La case del Mayor &c de Lym

1. IN an Ejectione firmæ, betwéen John Button Plaintiff, and Etheldred Wrightman Widow, and other Defendants; for an House and certain Lands in Harrow. The Case upon a special Verdict was this; The Dean and Chapter of Christ's-Church in Oxford were incorporated by King H. 8. by his Letters Patents, dated 4 Novemb. 38 H. 8. by the name of the Dean and Chapter of the Cathedral Church of Christ, &c. Oxford, of the Foundation of King Henry the 8th. and so to be called for ever; after which the said Dean and Chapter was seised in their Demesn as of Fée, of the said House and Land, and so being seised by the name of the Dean and Chapter Ecclesiæ Cathedralis Christi in Accademia Oxon. ex fundatione Reg. H. 8. enfeoffed Edward, late Lord North thereof, by their Déed, bearing date the 21st day of April, 1 E. 6. who afterwards died, and the now Lord North entred, and did let it to the Plaintiff, who was ousted by the Defendant, claiming the said House by a Lease made by the said Dean and Chapter in the time of Quéen Elizabeth, for divers years yet to come, and whether his Entry were lawful, or not, was the question, and all depends upon the mis-naming of the Corporation: But it was found that the City of Oxford, and the University of Oxford were all one, and that the Town of Oxford was made a City by the Charter of King H. 8.

And by Fennor, the Feoffment made to Edward Lord North, for the mis-naming of the Corporation, was void, for he said, that Accademia & villa de Oxford, are divers in name, and divers in nature, for the University is to the Scholars and learned Men there, and the Town for the Inhabitants, and the name of a place is a principal thing in a Corporation, which in a new Corporation ought to be precise, according to the very Letter of the Charter thereof: And therefore in the Case of Chester it was agréed, that Cestria being omitted, the Charter for the Dean and Chapter there had béen void.

But by Popham, Gawdey and Clench, this is not such a mis-naming as to the place which shall make the Feoffment void: For suppose it had béen Decanus & Capitalis Ecclesia Cathedralis Christi in Civitate Oxon. it had béen good, for Oxon & Civitas Oxon. are one and the same. So it is if an Hospital to be erected by the name of the Hospital of S. Johns in S. Clements: and they make a Grant by the name of the Hospital of S. Johns in the Parish of S. Clements, it is good, for it appeareth to be the same: And here if a Man will say, that it shall go to the University of Oxford, this every one conceives to be the Town of Oxford, and so of Cambridge, and therefore in 8 H. 6. it was agréed to be a good Addition for the place in an Action Personal, against such an one Chancellor of the University of Oxford, and so it is against J. Rector of the Parish Church of Dale, without any other Addition for the place, yet the Statute is, that it ought to be named of what Town, Hamlet, or place the Party is. And by Popham, the place in a Corporation may well be resembled to the Sur-name of a Man, and as a Grant made by any Persons Christian name, as John, Thomas, &c. is not good, so in a Corporation it is not good to say, Dean and Chapter, Mayor and Commonalty, and the like, without

without saying, of what place: And anciently Men took most commonly their Sur-names from their places of Habitation, especially Men of Estate, and Artizans often took their Names from their Arts, but yet the Law is not so precise in the Case of Sur-names, and therefore a Grant made by, or to John, Son and Heir of I. C. or Filio juniori I.S. is good: But for the Christian Name, this always ought to be perfect.

So in the Case of a Corporation, it sufficeth to have a sufficient demonstration of the place where the Corporation is, albeit it be not by the precise words comprised in the Charter: as in naming Accademia Oxon. pro Villa Ox. and it is common, of which I have seen divers Charters, where a Town was incorporated by the name of Mayor, and Commonalty of such a Town, as Bristol, Exeter, and others, which afterwards have been made Cities, and yet Charters made to them, and Grants made by them, by the name of Mayor and Commonalty of the City is good, but more precisenels is used in the Body of the name of a Corporation before the place to which they are annexed, and yet in them, that which is but an Ornament to the Name comprehended in the Charter, shall not hurt the Grant, as of Chapiter of S. George of Windsor, if it be of S. George the Martyr, and the like, the Grant by such a name is good, because the Martyr is but an addition of Ornament to the name comprised in the Charter, and it is no other but the same in re vera. So here, if it had been Domini nostri Jesu Christi, because it is the same, and is but an Ornament to the word Christ comprised in the Charter, and so should it be also if it had been Christi filii Dei Salvatoris nostri, because it is but a true addition to the same; whereupon Judgment was given for the Plaintiff, as appeareth in the King's Bench, Pasch. 35 Eliz. Rot. 258.

And Popham said further in this Case, that to erect an Hospital by the name of an Hospital, in the County of S. or in the Bishoprick of B. and the like, is not good, because he is bound to a place too large, and uncertain; But a College erected in Accademia Cantabrig. or Oxon. is good, and some are so founded because it tends but to a particular place, as a City, Town, &c.

King *versus* Bery *and* Palmer.

2. IN an Ejectione firmæ, brought by William King against John Bery and William Palmer Defendants, for two Messuages and certain Lands in Halstead in the County of Leicester, upon a Demise alledged to be made by Dorothy Pool, and Robert Smith, the Case upon a special Verdict was this; The said Dorothy was Tenant for life of the said Tenants, the Remainder over to the said Robert Smith and his Heirs, and they being so seised made the Lease in the Declaration, upon which the Action was brought. And per curiam, the Lease found by the Verdict doth not warrant the Lease alledged in the Declaration; for although they joyned in the Demise, yet during the life of the said Dorothy it is her Demise, and not the Demise of the said Robert Smith; but as his Confirmation for that time: for he hath nothing to do to meddle with the Land during the life of the said Dorothy, but after the death of the said Dorothy then it shall be said to be the Demise of the said Robert Smith, and and not before, because until this time Smith had nothing to do to meddle with the Land. And in a more strong Case, If Tenant for life and he in the Reversion in Fee make a Gift in Tail, for the life of Tenant for life, it shall be said to be his Gift, but after his death it shall be said the Gift of him in the Reversion, and if the Estate Tail had expired during the life of the said Tenant for life, he shall have the Land again in his former Estate, and there shall be no Forfeiture in the Case, because he in the Reversion of the immediate Estate of Inheritance had joyned in it, and therefore hath dispensed with that which otherwise had been a meer Forfeiture of the Estate for life, whereby it was awarded by the Court that the Plaintiff take nothing by his Bill in 33 & 34 Eliz. Rot. And the Judgment is entred, Hill. 34 Eliz. Rot. 72.

3. In this Term I happened to ſee a Caſe agreed by the Juſtices in 3 & 4 Eliz. which was this:

If a Man make a Leaſe of two Barns, rendring Rent, and for default of Payment, a Re-entry, if the Tenant be at one of the Barns to pay the Rent, and the Leſſor at the other end to demand the Rent, and none be there to pay it, that yet the Leſſor cannot enter for the Condition broken, becauſe there was no default in the Tenant, he being at one, for it was not poſſible for him to be at both places together.

And upon this Caſe now remembred to the Juſtices, Popham, Walmſley, and Fennor ſaid, That perhaps alſo the Tenant had not Money ſufficient to have been ready to have paid it, at either of the ſaid places, but it is ſufficient for him to have and provide one Rent, which cannot be at two places together.

And by the Caſe reported here alſo; If Lands and Woods are demiſed together, the Rent ought to be demanded at the Land, and not the Wood, becauſe the Land is the more worthy thing, and alſo more open than the Wood: And therefore by the three Juſtices aforeſaid, Rent ought not to be demanded in any private place of Cloſe, as amongſt Bushes, in a Pit, or the like, nor in the open and moſt uſual Paſſage thereof, as at a Stile, Gate, and the like.

4. Upon a Prohibition ſued out of the King's Bench, the Caſe appeared to be this.

The late Lord Rich, Father to the now Lord Rich, deviſed to his Daughter for her Advancement in Marriage 1500 l. upon condition, that ſhe marry with the Conſent of certain Friends; and deviſeth further, that if his Goods and Chattels are not ſufficient to pay his Debts and Legacies, that then there ſhall be 200 l. a year of his Lands ſold to ſupply it, and dies, making the now Lord Rich his Executor, his Goods and Chattels not being ſufficient to pay the Debts of the Teſtator, as was averred, the ſaid Daughter married with an Husband againſt the Will of thoſe who were put in truſt to give their Aſſents: and the Husband and the Wife ſued in the Spiritual Court for the Legacy: and it was ſurmiſed that they would not allow the Proofs of the ſaid now Lord Rich, exhibited to prove the Payment of the Debts of his Teſtator; and further, that they would charge him for the Sale of the Land; upon which matter the Prohibition was granted to the Delegates, before whom the matter depended, and now Conſultation was prayed in the Caſe.

Upon which it was affirmed by a Doctor of the Civil Law, that they will allow the Proofs for the Payment of the Debts, according to our Law, and that the Legacy ſhall not be paid until the Debts are ſatisfied. But he ſaid, that by the Law, if the Executor do not exhibit his Inventory, but neglect it for a year, or more, that then if any omiſſion or default be in the true value of the Inventory exhibited, that then ſuch an Executor for this default ſhall pay all the Legacies of his Teſtator, of what value ſoever they are, not reſpecting the Debts, or the value of the Goods or Chattels, how ſmall ſoever the omiſſion, or default be in the Inventory; And ſo he ſaid was the Caſe of the now Sir Richard S. who did not bring in the Inventory for four years after the death of the Teſtator, and that in the Inventory exhibited, the Values of every thing were found to be too ſmall, and therefore to be charged by their Law, albeit he hath not Goods and Chattels ſufficient of the Teſtator's. To which it was anſwered, that this was quite without reaſon, for by ſuch means every Subject of the Realm may be utterly defeated, if he take upon him the charge of an Executorſhip: And if this ſhall be admitted, no Man will take upon him the Execution of the Will of any, and by ſuch a means none will have their Wills performed, which ſhall be too inconve-

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nient. And they ſaid further, that in as much as Debts are to be proved by the Common Law of the Realm, thoſe of the Eccleſiaſtical Courts ought to admit in the Proof thereof ſuch Proofs as our Law allows, and not according to the preciſeneſs of their Law: And although by their Law ſuch a Condition as before being annexed to a Legacy, is void, becauſe that Marriage ought to be free without Coertion, yet where we are to judge upon the Point (as we are here) if the Execution happen to be charged becauſe of the Sale of Land, and for the Money coming thereof, a Prohibition ſhall be granted to the Eccleſiaſtical Judge in ſuch a Caſe, whereby the Court granted a ſpecial Conſultation in the Caſe, to wit, that they proceed for the Legacy, provided, that they charge the Executor no further than he hath in Goods and Chattels of the Teſtator, after his true and due Debts are ſatisfied: and that in the Caſe of the Proof of theſe Debts, they allow ſuch Proofs as by the Law of the Land are holden to be ſufficient in ſuch a Caſe; Quod nota bene, as to the reſtraining of Eccleſiaſtical Courts in their Proceedings, to bind any Subject touching his private Temporal Eſtate, againſt all reaſon: And as to it, that they do not intermeddle in any thing belonging to the Common Law of the Realm, as Debts, and the like, againſt the due Courſe of the Common Law

Cawdry *verſus* Atton.

5. IN Treſpaſs brought by Robert Cawdry Clerk, againſt George Atton, for breaking his Cloſe at North Luffenham in the County of Rutland, upon Not Guilty, and a ſpecial Verdict, the Caſe appeared to be this, to wit, that the Plaintiff was Rector Eccleſiæ de North Luffenham aforeſaid, of which the place was Parcel, and being ſo ſeiſed, was deprived of his Rectory by the late Biſhop of London and his Colleagues, by virtue of the high Commiſſion to them and others directed, becauſe he had pronounced and uttered ſlanderous and contumelious words againſt, and in deprivation of the Book of Common Prayer; But the form of the Sentence was, that the ſaid Biſhop by and with the Aſſent and Conſent of five others of the ſaid Commiſſioners his Companions, and namely which deprived him. *Vide* this Caſe *Coke, lib.* 5. 1. *pa.*

And further, it was not found that the Commiſſioners named were the natural Subjects born of the Queen, as the Statute enacts that they ſhould be: and if the Deprivation be void, then they find the Defendant Guilty, and if it were good, then they find him Not Guilty. And it was moved that the Deprivation was void.

Firſt, Becauſe that whereas the Commiſſion is to them, or any three of them, of which the ſaid Biſhop to be one amongſt others, it ought to have been the Sentence of them all, according to the Authority given to them, which is equal, and not that it was done by one with Aſſent of the other. Then becauſe it is not found that the Commiſſioners are the natural Subjects of the Queen born, as by the words of the Statute they ſhould be.

Another is, becauſe the Puniſhment which the Statute provides for thoſe of the Miniſtry which deprave this Book, is to loſe the Profits of all their Spiritual Promotions but for a year, and to be impriſoned by the ſpace of ſix months, and not to be deprived until the ſecond Offence, after that he had been once committed, and therefore to deprive him for the firſt Offence was wrongful and contrary to the Statute. But by the whole Court for the form of the Deprivation, it is, that which is uſed in the Eccleſiaſtical Courts, which always names the chief in Commiſſion that are preſent at the beginning of the Sentence, and for the other they mention them only as here, but of their Aſſent and Conſent to it, and in ſuch Caſes we ought to give Credit to their Form, and therefore it is not to be compared to an Authority given at Common Law by Commiſſion.

And for the matter that is not found, that the Commiſſioners were the natural Subjects of the Quẽn born, it is to be intended that they were ſuch, unleſs the contrary appear: But here at the beginning it is found that the Quẽn, ſecundum tenorem & effectum actus prædict. had granted her Commiſſion to them in cauſis Eccleſiaſticis, and therefore it appeareth ſufficiently that they were ſuch as the Statute wills them to be.

And for Deprivation, they all agreed that it was good, being done by the Authority of the Commiſſion, for the Statute is to be underſtood where they proſecute upon the Statute by way of Indictment, and not to reſtrain the Eccleſiaſtical Juriſdiction, being alſo but in the Affirmative.

And further by the Act and their Commiſſion, they may proceed according to their diſcretion to puniſh the Offence proved or confeſſed before them, and ſo are the words of their Commiſſion warranted by the Clauſe of the Act.

And further, the Eccleſiaſtical Juriſdiction is ſaved in the Act.

And further, all the Biſhops and Popiſh Prieſts were deprived by virtue of a Commiſſion warranted by this Clauſe in the Act: And now lately was it agreed by all the Juſtices, that a Fine of 200 Marks ſet upon one for a vitious Liver by the High Commiſſion was warranted by virtue of the Commiſſion and Act: And therefore the Act with the Commiſſion, are to be conſidered in this Caſe, whereupon it was agreed that the Plaintiff ſhould take nothing by his Writ: Which you may ſee, Hill. 33 Eliz. Rot. 315.

Hall *verſus* Peart.

6. IN an Ejectione firmæ brought by William Hall Plaintiff, for Land in D. in the County of Somerſet, upon a Leaſe made by William Dodington, againſt John Peart and other Defendants, upon a ſpecial Verdict the Caſe appeared to be this.

Vide this Caſe in *Coke*, *lib.* 2. 32, 33. by the name of *Dodington*'s Caſe.

That one John Brown was in Poſſeſſion of certain Lands in D. aforeſaid, which before were parcel of the Poſſeſſions of the Hoſpital or Priory of S. John's in Wells, the Inheritance thereof then being in the late King H. 8. by the Act of Diſſolutions: And the King being ſo ſeiſed by his Letters Patents, dated the 26th of March, 30 H. 8. *ex gratia ſpeciali, certa ſcientia & mero motu ſuo*, granted to John Aylewoꝛth and Ralph Duckenfield, *omnia illa Meſſuagia Ter. Tenemt. & gardina ſua & quæcunque tunc in ſeparalibus tenuris diverſarum perſonarum*, which he named particularly, amongſt which the ſaid John Brown was one in *Civitate Wellen. ac in Suburbiis eſuſdem Civitat. & extra eandem Civitat.* within the Juriſdictions and Liberties of the ſaid City, late parcel of the Poſſeſſions of the ſaid Hoſpital, and that the ſaid John Brown had not then any other Lands late parcel of the Poſſeſſions of the ſaid Hoſpital, but this in D. and that this Land was quite out of the ſaid City of Wells, and of the Suburbs thereof, and alſo out of the Liberties and Juriſdiction of the ſaid City, and yet it was found that it was in the particular and parcel of the value, and valued in it in the Tenure of the ſaid John Brown at 6 *s.* 8 *d.* a year, and the Grant was to the ſaid John Aylewoꝛth and Ralph Duckenfield, and to the Heirs of the ſaid John Aylewoꝛth for ever.

And it was moved that the Grant was good to the ſaid Ayleworth and Duckenfield, becauſe of the Statute of Non-recital and Miſ-recital, becauſe it appeareth by the particular, and value that it was intended to be paſſed: And if this doth not paſs, nothing can paſs which was in the Tenure of the ſaid Brown, becauſe he had nothing in the places compriſed in the Patent.

But it was agreed by all the Court, that it ſhall not paſs by the ſaid Patent in this Caſe, for the word (illa) is to be reſtrained by that which follows in the Patent, where it depends upon a Generality, as here, and that it refers but to that in Wells, as the Liberty of that which was parcel of the Poſ-

ſeſſions

ſeſſions of the ſaid Hoſpital, and in the Tenure of the ſaid John Brown: And if it were not of theſe Poſſeſſions, or not in Wells, &c. or not in the Tenure of the ſaid John Brown, it ſhall not paſs, for the intent of the King in this Caſe ſhall not be wrested according to the particular or the value, which are things collateral to the Patent, but according to his intent comprized in, or to be collected by the Patent it ſelf.

And Popham ſaid, that by Grant of omnia, terras Tenementa & Hereditamenta ſua in Caſe of the Queen nothing paſs, if it be not reſtrained to a Certainty, as in ſuch a Town, or late parcel of the Poſſeſſions of ſuch an one, or of ſuch an Abby, or the like, in which Caſes it paſſeth, as appeareth by 32 H. 8. in Caſe of the King: But if it be Omnia, terras & tenementa ſua vocat. D. in the Tenure of ſuch an one, and in ſuch a Town, and late parcel of the Poſſeſſions of ſuch an one, there albeit the Town or the Tenant of the Land be utterly miſtaken, or that it be miſtaken of what Poſſeſſions it was, it is good, for it ſufficeth that the thing be well and fully named, and the other miſtakes ſhall not hurt the Patent.

And the word of Ex certa ſcientia, &c. will not help the Patent in the principal Caſe. And the Caſe of 29 E. 3. is not to be compared to this Caſe, for it was thus.

The King granted the Advowſon of the Priory of Mountague (the Prior being an Alien) to the Earl of Salisbury and his Heirs for ever: And alſo the keeping and Farm with all the Appurtenances and Profits of the ſaid Priory, which he himſelf had during the War, with the keeping of certain Cells belonging to the ſaid Priory; the ſaid Earl died, William Earl of Salisbury being his Son and Heir, and within Age: whereupon the King reciting that he had ſeiſed the Earl's Lands into his hands after his death, for the Nonage of the Heir, he granted to the ſaid Earl all his Advowſons of all the Churches which were his Fathers, and all the Advowſons of the Churches which belong to the Prior of Mountague, to hold until the full Age of the ſaid Heir, *& quas nuper conceſſit præfat. Comiti patri, &c.* In which Caſe, although the King had not granted the Advowſons to the ſaid Earl the Father aforeſaid, by the former Patent, becauſe no mention was of the Advowſons thereof, yet they paſs by this Patent, notwithſtanding that which follows after, to wit, and which he granted to the Father of the Grantee: But there it is by a Sentence diſtinct, and not fully depending upon the former words, as here, to wit, *Omnia illa Meſſuagia, &c.* in Wells, in the Tenure of the Party, parcel of the Poſſeſſions of ſuch an Hoſpital, or Priory: *Quod nota*, and the difference.

And becauſe the Defendant claimed under the firſt Patent, and the Plaintiff by the latter Patent, it was agreed, that the Plaintiff ſhould recover: Which you may ſee in the King's Bench.

Harrey *verſus* Farcy.

7. IN an Ejectione firmæ brought by Richard Harrey Plaintiff, for the Poyety of certain Tenements in North-Petherton, in the County of Somerſet, upon a Leaſe made by Robert Bret againſt Humfrey Farcy Defendant, upon Not Guilty, and a ſpecial Verdict found, the Caſe appeared to be this, to wit, That Robert Mallet Eſquire was ſeiſed of the ſaid Tenements, in his Demeſn as of Fee, and ſo ſeiſed, demiſed them to John Clark, and Elianor Middleton, for term of their lives, and of the longer liver of them, after which the ſaid Tenements (amongſt others) were aſſured by Fine to certain Perſons and their Heirs, to the uſe of the ſaid Robert Mallet for term of his life, and after his deceaſe to the uſe of John Mallet his Son and Heir of his Body; and for default of ſuch Iſſue, to the uſe of the right Heirs of the ſaid Robert Mallet.

After

After which the ſaid Robert Mallet (having Iſſue the ſaid John Mallet, Chriſtian and Elianor Mallet) died, the ſaid John Mallet then being within Age, and upon Office found in the County of Devon, for other Lands holden of the Quæn in Capite by Knights Service was for it in Ward to the Quæn: Afterwards the ſaid John Mallet died without Iſſue during his Nonage, and the Lands aforeſaid thereby deſcended to his ſaid two Siſters, to whom alſo deſcended other Lands in the County of Devon, holden of the Quæn in Capite by Knights Service, conveyed alſo by the ſame Fine in like manner, as the Lands in North Petherton, the ſaid Chriſtian then being of the Age of twenty two years, and the ſaid Elianor of the Age of fifteen years, upon which the ſaid Chriſtian and Elianor, 12 Novemb. 31 Eliz. tendred their Livery before the Maſter of the Wards, and before the Livery ſued, the ſaid Chriſtian took the ſaid Robert Bret to Husband, and the ſaid Elianor took to Huſband one Arthur Ackland; after which in the Utas of the Purification of our Lady, 32 Eliz. the ſaid Robert Bret and Chriſtian his Wife, levied a Fine of the ſaid Tenements in North Petherton, amongſt others to George Bret and John Peckſey, Sur conuſance de droit come ceo que ils ont de lour done, by the name of the Poyety of the Pannor of North Petherton, &c. with Warranty againſt them and the Heirs of the ſaid Chriſtian againſt all Men, who tendred it by the ſame Fine to the ſaid Robert Bret and Chriſtian, and the Heirs Males of their Bodies, the Remainder to the Heirs Males of the Body of the ſaid Chriſtian, the Remainder over to the right Heirs of the ſaid Robert Bret, which Fine was engroſſed the ſame Term of S. Hillary, and the firſt Proclamation was made the 12th day of February in the ſame Term; the ſecond, The firſt day of June in Eaſter Term, 32 Eliz. The third, the 8th day of July in Trinity Term next: And the fourth Proclamation was made the 4th day of October in Michaelmas Term next after. And the ſaid Chriſtian died without Iſſue of her Body. The 9th day of February, 32 Eliz. between the hours of 3 and 7 in the Afternoon of the ſame day. And the 22d of March, 32 Eliz. the ſaid Robert Bret by his Writing indented, dated the ſame day and year, for a certain ſum of Money to him paid, by the Queen, bargained and ſold, gave and granted the ſaid Tenements to the ſaid Quæn, her Heirs and Succeſſors for ever, which Deed was acknowledged the 25th day of March, 32 Eliz. and enrolled in the Chancery the 12th day of May, in the ſame year: And there was a Proviſo in the ſame Deed, that if the ſaid Robert Bret ſhall pay to the Quæn at the Receipt of the Exchequer 5 s. of lawful Money, that then the ſaid Gift, Grant, Bargain and Sale ſhall be void, and that from thence-forward it ſhall be lawful for the ſaid Robert Bret and his Heirs to re-enter into the ſaid Tenements, and in the mean time between the Inrolment of this Deed and the ſaid 14th day of October, to wit, the 15th day of September, 32 Eliz. the ſaid Arthur upon the ſaid Tenements in North Petherton, entred and claimed the Reverſion thereof in the Right of the ſaid Elianor his Wife, by reaſon of the death of the ſaid Chriſtian: And that afterwards, to wit, the 30th day of February, 33 Eliz, the ſaid Robert Bret to redeem the ſaid Tenements out of the Quæn, paid the ſaid 5 s. at the Receipt of the Exchequer, which Payment is there recorded, and enrolled accordingly; after which in September, 34 Eliz. the ſaid Arthur and Elianor ſued out the ſpecial Livery of the ſaid Elianor, out of the hands of the Quæn, of all the Lands ſeiſed into the hands of the Quæn by reaſon of the Nonage of the ſaid John Mallet. And afterwards in the ſame Month of September, 34 Eliz. the ſaid Arthur and Elianor ſued out another ſpecial Livery, as Heir to the ſaid Chriſtian, of all the Lands which are in the Quæns hands by the death of the ſaid Chriſtian.

And it was further found that the ſaid John Clark and Elianor Middleton died after the 5 s. paid as before, and that the ſaid Robert Bret entred the 8th day of October, 34 Eliz. and then made the Leaſe to the Plaintiff, upon which

which the Defendant by Commandment of the ſaid Arthur, and with him entred upon the Plaintiff; and the general Queſtion was, whether the Entry of the Defendant were lawful? But no Ouſter of the Plaintiff was found.

And by Clench and Fennor, a Fee-ſimple paſs at Common Law by a Fine levied by him in Reverſion, or Remainder in Tail, becauſe a Fine is ſaid to be a Feoffment of Record, and by their Entry and Feoffment a Fee-ſimple paſs in ſuch a Caſe at Common Law.

But by Popham and Gawdy, a Fee-ſimple doth not paſs, nor nothing but that which Tenant in Tail may lawfully grant over, which is for his life, in which he ſaid, that Littleton was plain in all Caſes of Grant, although it be by Fine, and a Fee-ſimple does not paſs at Common Law, but where the Fee may be drawn out of him who had the Reverſion or Remainder in Fee thereupon, if ſuch a Reverſion or Remainder had been in a Stranger, which had not been in this Caſe, if the Reverſion or Remainder had been in a Stranger; and therefore a Diſcontinuance cannot be of an Intail where the Reverſion or Remainder is in the King.

But by them all, however it was at Common Law, it is clear upon the Statute of Fines, that a Fee-ſimple determinable paſs by ſuch a Fine as ſoon as the Fine is levied, becauſe every Fine by preſumption of Law ſhall be taken to be ſuch whereupon Proclamation was made, until the contrary thereof appeareth to the Court.

And this is the reaſon why a Quid juris clamat is at this day maintained upon ſuch a Fine, which was not at Common Law before this Statute, or otherwiſe it will never lye. And ſo it was holden lately in the Common Bench, in the Caſe of Juſtice Wimondham, and yet we may ſee that the Quid juris clamat ought to be brought before that the Fine be engroſſed, whereby it is manifeſt that now a Fee-ſimple ſhall paſs by the Fine levied, for the poſſibility of the Proclamations, to wit, that the Proclamations ſhall not be made, and to this Fee-ſimple the Proclamations ſhall enure to make a Bar to the Eſtate Tail: But ſuch a Fine by Popham and Gawdy was not any wrong to him who had the Reverſion or Remainder in Fee being levied by him who had a mean Reverſion or Remainder in Tail, depending upon an Eſtate for life, or in Tail Precedent.

And it is clear, that the Proclamations do not make the Eſtate, but enure to the Eſtate made by the Fine, for if an Eſtate be granted in Reverſion for life, or in Tail by Fine, with Proclamations by ſuch a Tenant in Tail, in Reverſion or Remainder, the Proclamations work to this Eſtate, and no further, for always the Eſtate paſs by the Fine, and the Proclamations make the Bar according to the Eſtate, which paſs by the Fine before.

But by Clench, Gawdy and Fennor, the Fee ſimple which was in the Queen after the Fine levied as before, was diveſted by means of this Claim made upon the Poſſeſſion of the Queen, ſo that the Proclamations following are of no force to hurt the Eſtate Tail, for they ſaid, in divers Caſes a Poſſeſſion may be inveſted out of the Queen without Office, Petition or Monſtrans de droit, as the Caſe is, where a Man devile that his Land ſhall be ſold, and in the mean time before the Sale, the Poſſeſſion of the Land cometh to the Queen, and afterwards the Land is ſold according to the Will, the Vendee enter, there the Land paſs from the Queen thereby, and is diveſted, and ſo in many other Caſes. And in all Caſes where the Queens Eſtate is determined, the Subject may enter into the Land without Office, or Ouſter le main, &c. And they ſaid, if it had been in the Poſſeſſion of a common Perſon, that by ſuch a Claim the force of the Fine had been defeated; and this appeareth by the Caſe between Smith and Stapleton in the Commentaries, where it is holden that where a Fine is levied with Proclamations by Tenant in Tail of an Advowſon, Rent or Tithes, by Claim made by the Iſſue in Tail, before the Proclamations are paſſed, where the Tenant in Tail is dead, the

ſame

same is defeated, and that the Proclamations passing afterwards, shall not be of force to bar the Intail.

And they said, that the Conveyance thereof to the Quæn after the Fine levied, doth not make it to be in worse Case; And admit it will not serve against the Quæn, yet the Claim will serve against Bret, when he had entred by the performance of the Condition.

And Clench and Gawdy said, that Bret shall not take advantage of this Covenous Deed made by himself, of very purpose to bar the Party who had Right, and to put him without Remedy no more than where the Disseisor enfeoff his Father who dies seised, he shall not take advantage of this Descent, or if he who hath cause of Action to recover Lands by Covin, causeth another to enter into the Lands, to the intent to recover against him, and does it accordingly for the Covin, the Recovery shall be avoided, and in the same manner here.

But Popham took a Diverlity, where the Possession or the Estate of the Quæn is determined, and where not, for where the Estate is determined, there the Subject may enter into the Land without Office, or Custer le main: But where the Possession continues, there the Party shall not come to it, unless by Petition, Monstrans de droit ex officio, or the like, and therefore he said, that if the Quæn had an Estate pur aute vie, or depending upon any other Limitation, if it be determined according to the Limitation, the Party who hath Interest may enter; so in the Case of the Devise put before.

And if a Leale be made for life, the Remainder in Tail, the Reversion in Fee, and he in the Remainder in Tail levy a Fine, Sur conusance de droit come ceo que il ad de son done to a Stranger with Proclamations according to the Statute, and afterwards the Stranger convey the Remainder, to the Quæn, her Heirs and Successors, and after the Tenant for life dies, and after he in the Remainder in Tail dies without Issue, now may he in the Remainder in Fee enter, because the Estate of the Quæn is determined: But here the Queen hath a Fee-simple in her self but determinable upon the Estate Tail which yet remaineth, which Fee-simple in Reversion cannot be divested out of the Possession of the Quæn but by matter of Record, of so high nature as it is in her, to wit, by Petition, Monstrans de droit, or the like: As if a Reversion or Remainder be alienated in Mortmain, the Claim of the Lord sufficeth there to vest the Reversion in the Lord for the Alienation, but if the Reversion or Remainder of which such a Claim was made be conveyed to the King, his Remedy is now by Office, Monstrans de droit, or Petition, for Claim will not now serve him, for this shall be to divest the Possession out of the Quæn, which by such means cannot be done no more than where a Reversion or Remainder is granted to the Quæn upon Condition, but he ought to have an Office to find the performance of it, if it be to be performed by matter in pais, and without Monstrans de droit, or otherwise it shall not be divested out of the Queen's Possession, yet in the Case of a common Person, a Claim will divest it out of them, but not so of the Queen.

And these Cases Gawdy agreed; but he conceived that in the Case in question, the Claim made determines the Estate of the Queen, which is made by means of the Fine upon the Statute.

And Popham denied the Case put in 7 H. 6. to be Law, as it is put upon the Opinion of Strange there, for it is clear, that the Claim there does not divest any Possession which was in the King by means of the Wardship, and if this be not thereby defeated, the Claim does not help the Disseisee against the Descent; and this appeareth fully by Littleton, who saith so of a Claim which avoids a Descent, to wit, that it ought to be such upon which the Disseisee may upon every such Claim made have an Action of Trespals or Assise against the Disseisor, or him who is in Possession, if he continue his Possession after such Claim made, which cannot be in this Case where the Possession

ſeſſion is in the King, which cannot be defeated by ſuch a Claim. And in the Lord Dyer where the Feoffee, or Mortgagee of Lands holden of the Queen in Capite by Knights Service, died before the day of Redemption, his Heir being within Age, whereby upon Office found, the Queen had the Wardſhip of the Body and Land of the Heir, after which the Mortgagor at the day of Redemption made payment, and of this alſo an Office was found, yet he could not enter either before or after Office, but upon Monſtrans de droit thereupon he had his Ouſter le main: And the reaſon why a Claim ſhall ſerve in this Caſe betwixt common Perſons, is, becauſe that by ſuch Claim the thing it ſelf is deveſted out of him who had it before, and thereby actually veſted in him who made the Claim: As where a Villain purchaſe a Reverſion by the Claim of the Lord, the Reverſion is actually in him, as it is of a Poſſeſſion by Entry: But where he is put to his Claim to diveſt any thing out of a common Perſon, he is put to his Suit to deveſt it out of the Queen.

And to ſay, that Bret ſhould not take advantage of this Conveyance made, to make it good by the Fine.

I think the Law to be clear otherwiſe as to this Point, for the Statute of Fines was made for the ſecurity of Purchaſors and Poſſeſſors of Land, and therefore taken more ſtrongly againſt them who pretend Right or Title, and for the greateſt advantage that may be for the Poſſeſſors of Lands, and therefore the Poſſeſſor by whatever means he can, may make his Fine to be forceable. And therefore the Fine upon this Statute differeth much from a Fine at Common Law; for where at Common Law an Infant being a Diſſeiſor was diſſeiſed by one who levies a Fine, and the year and the day paſs without Claim of the firſt Diſſeiſee, now was the firſt Diſſeiſee barred: yet if afterwards the Infant (who was not bound by the Fine) enter, the firſt Diſſeiſee may enter upon him, becauſe that by this Entry the Fine at Common Law was utterly defeated.

But now by the Statute, ſuch a Fine being levied with Proclamations, the firſt Diſſeiſee not purſuing according to the Statute, is barred for ever.

And although the Infant enter at full Age, and undoes the Fine as to himſelf, yet this Fine remains always to bar the firſt Diſſeiſee, and makes that the Infant hath now Right againſt all the World, and ſo now takes advantage thereof: And this is the intent of the Statute for the repoſe of Controverſies and Suits, and the Quiet of the People.

And if I procure a Fine to be levied on purpoſe to bar another of his Action, which he may have againſt me for the Land, yet I ſhall take advantage of this Fine, and the other ſhall have no advantage againſt me, becauſe of this Covin, for if this ſhould be admitted, it will countervail the benefit which is intended to be by means of the Statute of Fines.

And if a Diſſeiſor enfeoff another upon Condition, to the intent that a Fine with Proclamations ſhall be levied to the Feoffee to bar the Diſſeiſee, and after the Diſſeiſee is barred, the Diſſeiſor enter for the Condition, he ſhall yet take advantage of the Fine againſt the Diſſeiſee.

And Popham put a Caſe which was in this Court, 23 Eliz. upon a ſpecial Verdict which was betwixt Okes Plaintiff, upon the Demiſe of John late Lord Sturton of Cottington, which was this.

The Lord **Sturton** was Tenant for life of certain Lands in **Lighe** in the County of **Somerſet**, the Remainder in Tail to **Charles** late Lord **Sturton**, Father to the ſaid **John** Lord **Sturton**, and the ſaid **Charles** Lord **Sturton** diſſeiſed the ſaid Lady **Sturton**, and levied a Fine of the ſaid Land to **Cottington** and his Heirs with Proclamations according to the Statute, and warranted it againſt him, and his Heirs.

And the ſaid Lord Charles died before the Proclamations paſt, and the Warranty deſcended upon the ſaid John Lord Sturton, after which, and before the Proclamations paſt, the ſaid Lady Sturton entred upon the ſaid Cottington, after which the ſaid Lady died, and after her death and all the Proclamations paſt, the ſaid John Lord Sturton as Heir in Tail entred, and made the Leaſe to the ſaid Okes, upon whom Cottington the Defendant entred, as under the Right of the ſaid Cottington the Conuſee, and I perceiving the Court ſtrongly to incline upon the matter of Warranty, that it ſhall bar the Entry of the Heir, and make a Diſcontinuance againſt him, according to the Inference which is taken by Littleton in his Chapter of Diſcontinuance, becauſe the truth was, and ſo acknowledged to the Court (although it were omitted in the Verdict) that the ſaid Charles Lord Sturton was attainted of Felony and Murther, and ſo the Blood corrupted between the ſaid Charles and John Lord Sturton, whereby in a new Action the Guarranty had not hurt the Title of the ſaid Lord John.

I then moved the Court upon the other Point of the Fine with Proclamations; and the Court alſo agreed in this Point, if the Warranty had not been, that yet the Fine with Proclamations ſhall bar the ſaid John Lord Sturton, notwithſtanding the Entry made by the Lady Sturton were before the Proclamations paſt, becauſe that notwithſtanding his Regreſs made, the Reverſion remains in Cottington not defeated by his Regreſs, in reſpect of the Statute which makes that the Fine remains effectual againſt the Heir in Tail, if nothing be done by him to undo it before the Proclamations paſt as by Claim, Regreſs, and the like; but the Act of a Stranger ſhall not help him, whereby Judgment being thereupon given againſt the ſaid Okes, the ſaid John Lord Sturton ſtood ſatisfied, and the Cottingtons enjoy the Land to this day; whereas, if this Opinion of the Court had not been on a new Action, the ſaid Sir John might have been relieved againſt the Warranty.

And Gaudy ſaid: that this was a very good Caſe for the Point upon the Statute in this Caſe.

Earl of Shrewsbury *verſus* Sir Thomas Stanhop.

Gilbert Earl of *Shrewsbury*, againſt Sir *Thomas Stanhop*, in a *Scandalum Magnatum.*

Gilbert Earl of Shrewsbury brought a Scandalum Magnatum againſt Sir Thomas Stanhop Knight, and it was upon the Statute Tam pro Domina Regina quam pro ſeipſo, &c. For that Communication was had between the ſaid Sir Thomas, and one Francis Fletcher, of divers things touching the ſaid Earl, the ſaid Francis at ſuch a day and place, ſaid to the ſaid Thomas,

My Lord (the ſaid Earl meaning) is a Subject (innuendo) that the ſaid Earl was a Subject of the now Queen) the ſaid Sir Thomas then and there ſaid of the ſaid Earl theſe ſlanderous words, to wit, he (intending the ſaid Earl) is ſorry for that (meaning that the ſaid Earl was ſorry that he was then a Subject to our ſaid Soveraign Lady the Queen) that is his grief (meaning that it was grief to the ſaid Earl, that the ſaid Earl was ſubject to the Queen) to the damage of the ſaid Earl of 20000 l. To which the ſaid Sir Thomas Stanhop ſaid, that a Queſtion was formerly moved between the ſaid Earl and the Defendant, touching the Subverſion and drawing away of certain Weares heretofore erected by the ſaid Sir Thomas at Shelford, in the ſaid County of Nottingham, where the Action was brought to ouſt the River of Trent there, and that for the ſubverſion thereof a Petition was exhibited to the Privy Council of the Queen, before the ſpeaking of the ſaid words, by certain Inhabitants of the County of Lincoln, and divers other places not known to the Defendant, with the privity, allowance and knowledge of the ſaid Earl, which Petition at the time of the ſpeaking of the ſaid words, depended before the ſaid Council not determined, whereupon at the day and place compriſed in the Declaration, there was Communication

tion between the ſaid Defendant and the ſaid **Francis Fletcher** concerning their purpoſe to have the ſaid Wears ſubverted, and touching the ſaid Petition, upon which the ſaid **Francis** ſaid to the Defendent, the matter (meaning the Petition aforeſaid, hanging undetermined before the Council aforeſaid) is to be heard before the Privy Council (meaning the aforeſaid Council of the Queen) and what their Honours (meaning the Council aforeſaid) determine, my Lord (the aforeſaid Earl meaning) will willingly obey: To which the ſaid **Francis** then there anſwered, ſaying, My Lord (the aforeſaid Earl meaning) is a Subject, upon which the ſaid Defendant (they then having ſpeech as well of the ſaid Petition, as of the Order thereupon to be taken by the ſaid Council) anſwered ſaying, the words compriſed in the Declaration, meaning that he was ſorry, and grieved that he was ſubject to the Order to be made upon the Petition aforeſaid by the ſaid Council, and averred that this was the ſame Speech upon which the Action was grounded: upon which it was demurred in Law, and for cauſe ſhewn according to the Statute it was alledged that the Bar was defective, becauſe it is not alledged at what place, nor by whom, nor againſt whom the Petition was exhibited; and alſo becauſe that by the Bar the matter of the Declaration is not confeſſed, avoided or traverſed, and alſo that the Bar was inſufficient: And it ſeemed to **Fenner**, that the matter of the Bar had been ſufficient if it had been well pleaded: but the Plaintiff alledgeth the words to be ſpoken in one ſenſe in the Affirmative, and the Defendant ſhews matter alſo in the Affirmative which proves the words to be ſpoken in another ſenſe than the Declaration imports, and two Affirmatives can never make a good Iſſue, and therefore the Defendant ought to have taken a Traverſe to that which is compriſed in the Declaration, and for want of this Traverſe the Plea in Bar is not good.

Gawdy ſaid, that the Bar is not ſufficient neither in Matter nor Form; not in Matter, becauſe that whereas **Fletcher** ſaid, that the ſaid Earl was a Subject, this can have no other ſenſe, but that he was a Subject to the Queen in his Allegiance and her Sovereignty, and ſo much is drawn out of the courſe of their former Speech, and therefore the Anſwer which the Defendant made to it refers to his Subjection of Allegiance, and not to the matter of Obedience, which he owed to the Order of the ſaid Council, and if it cannot have any other ſenſe in good Underſtanding, he cannot help himſelf now by an **Innuendo**, which is in it ſelf according to common intendment, contrary to that which the nature of the words in themſelves do purport: And if it had been good for the Matter, yet it is not good for the Form, for want of a Traverſe, for without the Traverſe the Plea is not anſwered in that Caſe which is laid to the charge of the Defendant.

But **Popham** and **Clench** held ſtrongly to the contrary, and that this Bar is good in Matter, and (as the Caſe is) cannot be otherwiſe, and that the Form alſo is good enough, and yet the two Affirmatives cannot make a good Iſſue: but in caſe of two Affirmatives, a Traverſe ſhall not be, but where the Affirmatives do not agree in one. As if the Defendant in Treſpaſs entitles himſelf by the Feoffment of a Stranger, and the Plaintiff reply, and maintain that the ſame Stranger did enfeoff him, this cannot make a good Iſſue without a Traverſe of the Feoffment alledged to be made to the Defendant.

But in the ſame Caſe if the Plaintiff ſaith that true it is, that the Stranger enfeoffed the Defendant, but this was to the uſe of the Plaintiff and his Heirs, there no Traverſe ſhall be on the Plaintiffs part, becauſe as to the matter of the Feoffment it agrees with the Defendant, in which Caſe it ſhall not take any Traverſe, but there the Traverſe ſhall come on the Defendants part to maintain the Feoffment to his own uſe, **Abſque hoc**, that the Feoffment was to the uſe of the Plaintiff, for now that which the Defendant ſaith, (albeit it be in the Affirmative) yet it is a Traverſe to that which the Plaintiff hath alledged, and therefore he needs

not traverſe the Plea: And ſo a Diverſity where the Affirmative is, to traverſe that which is alledged by the other party, and where not, for in one Caſe the Concluſion ſhall be with a Traverſe, and in the other not: Then in this Caſe when the Plaintiff alledged that the Defendant ſpake theſe words, which **prima facie** ſhall be intended to be ſpoken in this ſenſe, as the Plaintiff hath alledged, although no **Innuendo** had been in the Caſe, for if it ſhall not be ſo intended without the **Innuendo**, the **Innuendo** will not help it, yet when the Defendant hath declared the circumſtance whereupon theſe words were ſpoken, and then the ſpeaking of them thereupon, now he hath confeſſed the very words themſelves to be ſpoken, but upon the Circumſtance diſcovered to be in another ſenſe than **prima facie** they are to be taken, and therefore he ſhall not take a Traverſe, for he acknowledgeth the very words, but not the Indentment which the very Law **prima facie** preſumes upon the words, and therefore ſhall not take a Traverſe: for this Intendment of Law being anſwered by matter expreſly in the Plea ſhall never be traverſed, as in the Caſe put of a Feoffment, **prima facie**, it ſhall be intended to be to the uſe of the Feoffee, yet when the other Party maintains that this Feoffment was to his uſe, he ſhall not take a Traverſe to that which the Law intends and preſumes.

And if a Man upon Speech had with an Hunter, ſaith, **That he hath murthered all the Hares within ſeven Miles of his Houſe**, and another anſwer and ſay, **he is a Murtherer indeed**, whereupon the Hunter brings an Action upon the Caſe againſt him, for ſaying, **that the Plaintiff was a Murtherer**, the Action will well lie.

Yet when the other ſhall diſcover the Communication whereupon the words were ſpoken, this ſhall be a good Bar without a Traverſe, yet if it be true that there were no ſuch Communication between the Parties as is mentioned in the Bar, the Plaintiff then hath good cauſe of Action, and therefore he may well ſay, **De injuria ſua propria abſque tali cauſa**, and this being found it ſhall be againſt the Defendant.

So upon Speech of a Butcher who had killed a thouſand Oxen in a year, and one hearing it will ſay, that **he is a notable Murtherer**, this upon the matter diſcloſed is not Actionable.

And it ſhall be miſchievous by a Traverſe or by pleading generally Not guilty, to put ſuch ſpecial matter in the mouth of Lay-people to give their Verdict upon, being ignorant, and therefore eaſie to be miſcarried in their Judgment, and therefore it ſhall be the rather admitted by ſpecial pleading to be put to the Judgment of the barred Judges, than in the mouths of Lay-Gents.

And here when **Fletcher** ſpeaking of the order to be taken by the Council, upon the Petition ſaid, **that the Earl would obey their Order**, to which the Defendant anſwered, **that he knew not what the Earl would do**, the ſaid **Fletcher** ſaid thereupon, **that he was a Subject**, and what was the intent of **Fletcher** in ſaying ſo? no other, but that becauſe he was a Subject, therefore he ought to obey; and if it be ſo to be underſtood, as of neceſſity it ought, (or elſe they were not ſpoken by **Fletcher** to any purpoſe, which cannot be intended) then ſhall the words following (**being ſpoken thereupon by the Defendant**) be taken to be ſpoken in Anſwer to the matter of the Speeches ſpoken by the ſaid **Fletcher**, and this is, that he was ſorry, and it was his grief that he muſt be ſo ſubject as to be bound thereby to obey their Order: as if a Man ſaith to another, **that he was ſorry that he was ſo ſubject, that he muſt obey a Judgment againſt him in the Queens Court**, this is no cauſe of Action, for this tends but to his ſubjection to the Law, or good Order, or the like, which do not give cauſe of Action: As if one

one ſaith of another, **that he is of the Temple, who always rebel againſt the Governors of the ſaid Houſe**, then ſaith another to him, **Will you ſay and maintain that he is a Rebel? Yea**, ſays one of the other, **I will do ſo**; If an Action be brought for the laſt words, the Action will lie, but if the other diſcover the Circumſtances of the Speech in the Bar, whereupon it was ſpoken, the Action will not lie: And this the Defendant may well do without traverſing that which is alledged, becauſe he acknowledgeth it, although in another ſenſe, then the Law *prima facie* imports upon the Declaration.

And if in Speech between two, one of them ſaith of a Stranger, **that he hath treacherouſly betrayed his Friend in revealing all his Secrets, and Counſels**, whereupon the other then ſaith, **that he hath done as a Traytor therein**, and the other ſaith to him again, **he is a Traytor**, and he anſwering to it, ſaith, **true, he is a Traytor**; Now if the Stranger brings an Action of the Caſe againſt him, for ſaying of theſe laſt words, *prima facie*, it imports the good cauſe of Action, without any **Innuendo**, as that he intended thereby that he was a Traytor to the Queen, becauſe the words in common intendment have ſuch a ſenſe, yet upon the matter diſcloſed by way of Bar, with the Circumſtances how they were ſpoken, the Plaintiff ſhall be barred, if he cannot maintain that they were ſpoken without ſuch a cauſe, which alters the Intendment that the Law hath otherwiſe of the words.

And **Gawdy** agreed alſo, that in ſuch Caſes the Defendant may plead the general Iſſue, and upon the matter alſo the Jury ought to find him Not Guilty.

But **Popham** and **Clench** ſaid, that this was a dangerous matter to be put in the mouths of the Lay-Gents, as hath been ſaid before, and therefore to put it to the Judgment of the Law by pleading.

And for the Exception they ought to have ſhewn here, where, by whom, and againſt whom the Petition was delivered, to this they ſaid, that the Exception was to no purpoſe, for this was but a Conveyance to the Speech uſed, which Speech was the ſubſtance of the Bar; and in this they put the Caſe of the Lord **Cromwel** which was in this Court, 22 **Eliz. Rot.** 752. in an Action upon the Statute of **Scandalum Magnatum**, by him brought againſt **Thomas Dye** Clark, for ſaying to the Lord **Cromwel, It is no News though you like not of me, for you like of thoſe that maintain Sedition againſt the Queens Proceedings**; in which the Defendant ſaid, **that he was Vicar to** North Linham, **in the County of Norf. and that the Plaintiff mentioned one** Vincent Goodwyn **Clark, at ſuch a time, and one** John Trendle **at ſuch another time, neither of them being licenced to preach in the ſaid Church, againſt the Will of the ſaid Defendant, and ſhew how they ſeverally preached there in their Sermons (and ſhew certainly in what point) Seditious Doctrine againſt the Laws of the Church, as againſt the Croſs uſed in Baptiſm, and the wearing of the Surplice**, and that afterwards in Speech thereupon between the ſaid Plaintiff and him, the Plaintiff ſaid to the Defendant, **That the Defendant was a falſe Knave**, and ſaid in Engliſh words, **that he liked not of the Defendant**; whereupon the Defendant ſaid the words compriſed in the Declaration **Innuendo, That he liked of the ſaid** Goodwyn **and** Trendle **who maintain Sedition** (Innuendo) **ſeditious Doctrine againſt the Queens Proceedings.** *Innuendo predict. Leges & Stat. Eccleſiæ hujus regni Angl. &c.* And the Plaintiff was put to anſwer, *Scilicet de injuria ſua propria abſque tali cauſa, &c.*

And note in this Caſe, the Defendant would firſt have juſtified for the matter preached by one, and it was not allowed by the Court, but he was put to ſpeak to both, or otherwiſe it had not been good, becauſe his Speeches were in the Plural Number, to wit, **That he liked of thoſe, which refers to more than to one.** And it was ſaid in this Caſe, that the word (**Subject**) might have ſeveral ſignifications according to the Circumſtance whereupon it is ſpoken: As Subject generally without more, is to be intended of the Queen, but according to the Circumſtance, it may be ſaid Subject of **England**, or Subject of **Ireland**, or ſubject

to

to the Law, or ſubject to any other Authority, or Power ſet over him, or ſubject to his Affections.

And if a Man ſaith of another, **that he is a Subject**, and therefore he ought to ſerve the Queen in her Wars, and he anſwers, **that he is ſorry for that, and is grieved for it**, no Action will lie for this, becauſe the Grievance refers to Service, which is to be done, and not to his Subjection as a Subject.

Dillon *verſus* Fraine.

See this in *Coke lib.* 1. 120. b. the name of *Chudleigh's* Caſe.

9. IN Treſpaſs brought by William Dillon Eſquire, againſt John Fraine, for breaking of his Cloſe at Taveſtock in the County of Devon, called Seden, upon Not Guilty, and a ſpecial Verdict, the Caſe appeared to be this, to wit, that Sir Richard Chudleigh Knight was ſeiſed in his Demeſn as of Fee, of the Manno^r of Heſcot, with the Appurtenances, in the County of Devon, of which the ſaid Cloſe was parcel, and ſo ſeiſed, 26 April 3. & 4. Phil. & Mar. by his Deed of Feoffment, of the ſame date enfeoffed Sir Tho. Saintleger Knight, and others, and their Heirs, of the ſaid Manno^r, to the uſe of the ſaid Sir Richard Chudleigh and his Heirs of the Body of the ſaid Elizabeth, then the Wife of Richard Bainfield Eſquire, lawfully begotten, and for default of ſuch Iſſue, then to the uſe of the ſaid Sir Richard Chudleigh, and of his Heirs of the Bodies of their Wives, of other Perſons lawfully begotten: And for default of ſuch Heirs, then to the uſe of the Perfo^rmance of the Will of the ſaid Sir Richard Chudleigh for ten years after his Deceaſe, and after the ſaid Term finiſhed, then to the uſe of the ſaid Sir John Saintleger and his Co-feoffees and their Heirs, during the life of Chriſtopher Chudleigh, Son and Heir Apparent of the ſaid Sir Richard, and after the death of the ſaid Chriſtopher, then to the uſe of the firſt Iſſue Male of the Body of the ſaid Chriſtopher, and to the Heirs Males of the Body of this firſt Iſſue Male, and for default of ſuch Iſſue, to the ſecond Iſſue Male of the Body of the ſaid Chriſtopher, and to the Heirs Males of the Body of this ſecond Iſſue Male, and ſo to the tenth Iſſue Male: And for default of ſuch Iſſue, then to the uſe of Thomas Chudleigh, another Son of the ſaid Sir Richard, and of the Heirs of his Body lawfully begotten; And for default of ſuch Iſſue, to the uſe of Oliver Chudleigh, another Son of the ſaid Sir Richard, and of the Heirs of his Body lawfully begotten; And for default of ſuch Iſſue, to the uſe of Nicholas Chudleigh another Son of the ſaid Sir Richard, and of the Heirs of his Body lawfully begotten, and for default of ſuch Iſſue, to the right Heirs of the ſaid Sir Richard Chudleigh for ever; whereby they were ſeiſed accordingly, after which the 17th of November, 5 & 6. Phil. & Mar. the ſaid Sir Richard died without any Heir of the Body of any of the Wives before-mentioned: And after that the ſaid Chriſtopher took to Wife one Chriſtian Strecheley, after which, to wit, the 14th day of Auguſt, 1 Eliz. the ſaid Sir John Saintleger and the other Feoffees, by their Deed of the ſame date, enfeoffed the ſaid Chriſtopher of the ſaid Manno^r, to have and to hold to him, and his Heirs for ever, to the uſe of the ſaid Chriſtopher and his Heirs, the ſaid Oliver Chudleigh then being living, after which, to wit, the 20th day of September, 3 Eliz. the ſaid Chriſtopher had Iſſue of his Body lawfully begotten, one Strechly Chudleigh his firſt Iſſue Male, And after this, to wit, the 30th day of March, 5 Eliz. the ſaid Chriſtopher had Iſſue of his Body lawfully begotten, one John Chudleigh his ſecond Iſſue Male, after which, to wit, the firſt day of July, 6 Eliz. the ſaid Chriſtopher by his Deed indented of the ſame date, and inrolled within ſix Months, according to the Statute bargained and ſold the ſaid Manno^r to Sir John Chicheſter Knight, and to his Heirs, and in the interim alſo between the date of this Deed, and the Inrolment thereof, to wit, the 6th day of July, in the ſame ſixth year, by his Deed of the ſame date, the ſaid Chriſtopher enfeoffed the ſaid Sir John Chicheſter and his Heirs of the ſaid Manno^r, and by the ſame Deed warranted it for him and his Heirs,

to

to the ſaid Sir John Chicheſter and his Heirs, whereupon the ſaid Sir John Chicheſter entred into the ſaid Manor, after which, to wit, the firſt day of October, 12 Eliz. the ſaid Chriſtopher died, after which, the 7th day of November, 13 Eliz. the ſaid Strechley Chudleigh died without Iſſue of his Body: And after the death of the ſaid Sir Richard Chudleigh, to wit, the 6th day of September, 7 Eliz. the ſaid Sir John Chicheſter enfeoffed one Philip Chicheſter and his Heirs of the ſaid Manor, to the uſe of the ſaid Philip and his Heirs.

And the ſaid Cloſe being Copy-hold and Cuſtomary Land of the ſaid Manor demiſable by the Lord of the ſame Manor, or his Steward, for the time being, for Life or Lives by Copy of Court-roll, according to the cuſtom of the ſaid Manor.

The ſaid Philip at a Court holden at the ſaid Manor, for the ſaid Manor, the 8th day of December, 15 Eliz. by Copy of Court-roll granted the ſaid Cloſe to the ſaid John Frain, for term of his life, according to the cuſtom of the ſaid Manor, after which, to wit, the 11th day of March, 28 Eliz. the ſaid John Chudleigh being now Heir to the ſaid Chriſtopher, enfeoffed the ſaid William Dillon of the ſaid Manor, to have and to hold to him and his Heirs, to the uſe of the ſaid William and his Heirs for ever, whereby he entred, and was ſeiſed, until the ſaid John Frain entred into the ſaid Cloſe upon him, the 8th day of February, 30 Eliz. upon which Entry of the ſaid Frain this Action is brought.

And for difficulty of the Caſe it was adjourned into the Exchequer-Chamber before all the Juſtices and Barons of the Exchequer, and there it was agreed by all, that a Warranty deſcending upon an Infant ſhall not bind him, in caſe that the Entry of the Infant be lawful into the Land, to which the Warranty is united: But the Infant ought in ſuch a Caſe to lok well that he do not ſuffer a Deſcent of the Land after his full Age, before he hath made his Re-entry, for then the Warranty, when he is to have an Action for the Land, ſhall bind him.

And they agreed alſo that a Copy-hold granted by a Diſſeiſor, or any other who hath the Manor of which it is parcel by wrong, ſhall be avoided by the Diſſeiſee, or any other who hath Right to the Manor by his Entry or Recovery of the Manor.

And ſo by Popham it was agreed by the Juſtices in the Caſe of the Manor of Haſſelbury Brian, in the County of Dorſet, between Henry late Earl of Arrundell, and Henry late Earl of Northumberland: but then he ſaid, that it was agreed, that Admittance upon Surrenders of Copy-holders in Fee, to the uſe of another, or if an Heir in caſe of a Deſcent of a Copy-hold were good, being made by a Diſſeiſor of a Manor, or any other who hath it by Wort, becauſe theſe are Acts of neceſſity, and for the benefit of a Stranger, to wit, of him who is to have the Land by the Surrender, or of the Heir: And alſo Grants made by Copy by the Feoffee, upon Condition of a Manor, before the Condition broken, are good, becauſe he was lawful Dominus pro tempore.

And for the matter upon the Statute of 27 H. 8. what ſhall become of this future Uſe limited to the firſt, ſecond, and other Iſſues Males not in Eſſe at the time of the Feoffment.

Ewens, Owen, Bateman and Fennor ſaid, That an Uſe at Common Law is no other than a Confidence which one Perſon puts in another, for a Confidence cannot be in Land, or other dead thing, but ought always to be in ſuch a thing which hath underſtanding of the Truſt put in him, which cannot be no other than ſuch an one who hath Reaſon and Underſtanding to perform what the other hath committed to him, which Confidence ſhall bind but in Privity, and yet the Confidence is in reſpect of the Land, but every one who hath the Land is not bound to the Confidence, but in Privity ſhall be ſaid to be in the Heir

Uſe, what it is.

Heir, and the Feoffee who hath knowledge of the Confidence, and in him who cometh to the Land by Feoffment without Conſideration, albeit he hath no knowledge thereof, and yet every Feoffee is not bound although he hath knowledge of the Confidence, as an Alien Perſon, Attaint, and the like, nor the King, he ſhall not be ſeiſed to another's uſe, becauſe he is not compellable to perform the Confidence; nor a Corporation, becauſe it is a dead Body, although it conſiſt of natural Perſons: and in this dead Body a Confidence cannot be put, but in Bodies natural.

And this was the Common Law before the Statute of 27 H. 8. Then the Letter of the Statute is not to execute any Uſe before that it happeneth to be an Uſe in Eſſe; for the words are, Where any Perſon is ſeiſed to the uſe of any other Perſon, that in ſuch a Caſe, he who hath the Uſe ſhall have the ſame Eſtate in the Land which he had before in the Uſe; Ergo, by the very Letter of the Law he ought to have an Eſtate in the Uſe, and there ought to be a Perſon to have the Uſe before the Statute intends to execute any Poſſeſſion to the Uſe, for the words are expreſs, that in every ſuch Caſe he ſhall have it, therefore not another: And therefore the Statute had purpoſe to execute the Uſes in Poſſeſſion, Reverſion, or Remainder, preſently upon the Conveyance made to the Uſes: But for the future Uſes which were to be raiſed at a time to come upon any Contingent, as to the Infants here, not being then born, the Statute never intended to execute ſuch Uſes until they happen to have their Being, and in the mean time to leave them as they were at Common Law, without medling with, or altering of them in any manner until this time, and if before this time, the Rot out of which theſe contingent Uſes ought to ſpring be defeated, the Uſe for this is utterly deſtroyed, and ſhall never afterwards have his Being; as here by the Feoffment made by the ſaid Sir John Saintleger and his Co-feoffees, who then were but as Tenents pur auter vie, to wit, for the life of Chriſtopher, and which was a Forfeiture of their Eſtate, and for which Oliver Chudleigh might have entred, it being before that the ſaid Strechley or John Chudleigh were born, the Poſſibility of them from Eſtate being the Rot out of which this future Uſe ought to have riſen is gone and deſtroyed, and therefore the Contingent Uſes utterly thereby overthrown.

As if before the Statute of 27 H. 8. Tenant for life had been, the Remainder over in Fee to an Uſe: If the Tenant for life had made a Feoffment in Fee, and he in the Remainder had releaſed to the Feoffee, the Uſe had been gone for ever, ſo in all theſe Caſes of Contingent Uſes at this day, for he who cometh to the Poſſeſſion of Land by Diſſeiſin, or wrong done to the Poſſeſſor who is ſeiſed to anothers uſe, ſhall never be ſeiſed to anothers uſe.

And the Caſe being ſo, that it is out of the Letter of the Statute to execute ſuch Contingent Uſes, it is more ſtrong for them out of the meaning of the Statute to execute, then before they happen to be in Eſſe: for this ſhall be to make all Miſchiefs comprehended in the Preamble of this Statute, and againſt which the Statute intended to provide ſufficient Remedy in a worſe Miſchief than they were before the making of the ſame Statute, and this ſhall be but a perverſe Conſtruction of the Statute.

And they ſaid, that the Subtilties uſed from time to time by means of thoſe Uſes, to the great deceit and trouble of the People, were the cauſe of the making of this Statute, 27 H. 8. and by all the Statutes formerly made touching Uſes, it appeareth that they were all taken to be grounded upon fraudulent and crafty deviſes, and therefore this Law had no great purpoſe to favour them, but a Fortiori, not to make them in worſe caſe by means of the Statute than they were before, and therefore it ſhall not be taken that the Uſe is executed by the Statute, which ſtands upon a Contingency, of which a greater miſchief will enſue, than there was in ſuch a Caſe before the Statute, and therefore by the Feoffment made in the interim, before the Birth of the Infants,

fants, which otherwiſe ought to have preſerved the Uſe, this Uſe was utterly deſtroyed; and although the Feoffee of Chriſtopher had notice of the Uſe, yet this doth not now help in the Caſe, becauſe the Feoffment did wrong to the Eſtate firſt ſetled, which was ſubject to the Uſe, and extinct in the ſame poſſibility which had been otherwiſe in the Feoffees to have given Livelihood to the ſaid Contingent Uſe: And therefore the Judgment by them ought to be, that the Plaintiff ſhall be barred.

Walmeſley, That the great miſchief which was at Common Law upon theſe Feoffments to Uſes, was, that none could know upon the Occupation of the Land, who was true Owner of the Land, for **Ceſtuy que Uſe** was the Perſon of the Profits, but in whom the Freehold or Inheritance of the Land was, there were not many which knew, whereby great miſchief came to the Aſſurances which Men had of Land which they purchaſed, and by it Men knew not againſt whom to bring their Actions to recover their Rights, and by it Wives loſt their Dowers, Husbands their Tenancy by the Courteſie, Lords their Eſcheats, Wardſhips, and the like.

And this miſchief happened by reaſon that one had the Profit, and another the Eſtate of the Land: And the Statute was made to put the Land and the Eſtate quite out of the Feoffee, who before did not meddle with the Land to Ceſtuy que Uſe, who before had but the Occupation and Profits of the Land, and to this intent the letter of the Law ſerves very well, which ſays that the Eſtate of the Feoffee ſhall be clearly in Ceſtuy que Uſe, and therefore nothing by the intent and letter of the Law is now to remain in the Feoffee, no more than a Scintilla juris memor'd in Brent's Caſe in my Lord Dyer, Eliz. and the whole Eſtate in the interim until the Contingent happen ſhall be in them who have their Uſes in Eſſe, and when the Contingent happen, the Statute gives place to this Contingent Uſe, and by the Execution thereof comes between the Eſtates before executed, and as out of theſe by the Statute, but nothing is now after the Statute in the Feoffees, for the purpoſe of the Statute was (as I have ſaid) to take away all from the Feoffee, for all was deveſted from him, becauſe that betwixt the Feoffor and the Feoffee was all the Fraud before the Statute, and the very letter of the Statute is to extinguiſh and extirpate the Aſſurances fraudulently made, which was alway by reaſon of Aſſurances made between the Eſtate of the Land in one, and the Poſſeſſion thereof in another, and to cauſe that now that the Eſtate ſhall be to the Uſe, where the Occupation was before: And this Statute was not made to extinguiſh or diſcredit Uſes, but to advance them, as by bringing the very Eſtate in Poſſeſſion to the Uſe, and by it the Truſt now taken from all others who were truſted with it before, ſo the Statute doth not condemn the Uſes, but the Fraud which was by reaſon of them before. And the Statute being, that the Eſtate, Right and Title of the Feoffees ſhall go to the Uſes, therefore nothing remaineth in the Feoffees, but all by Authority of Parliament adjudged to be in Ceſtuy que Uſe, which is the higheſt Judgment that can be given in any Court, and the words (Stand and be ſeiſed at any time) refer as well to the future, as preſent Uſes, and the Statute intended as well to help the Uſes which ſhall be upon any Contingent, as thoſe which are at preſent, for a future or contingent Uſe is to be ſaid an Uſe, according to its nature or quality, and it ſhall be executed according to its quality when it happen. And the words are, that the Eſtate which was in the Feoffee ſhall be in Ceſtuy que Uſe and not the Eſtate which is, and therefore when the Uſe happeneth to be in an inſtant, the Eſtate which at the firſt Livery was in the Feoffee, to this Uſe, ſhall now be executed in Poſſeſſion to this contingent Uſe, albeit it ſelf was altogether executed (as I ſaid before) in the Uſes which were in Eſſe, and if ſo, it followeth that nothing which is done in the mean time by the Feoffee or can be done by any other, can prejudice or hurt the Execution of this Uſe in Contingency when the Contingency happen.

And for the Caſe of Brook, 30 H 8. it is plain in point, which is this.

A Covenant with B. that if B. enfeoff him of three Acres of Land in D. that then the ſaid A. and his Heirs, and all others ſeiſed of ſuch Lands ſhall ſtand thereof ſeiſed to the uſe of the ſaid B. and his Heirs, after which A. enfeoffed a Stranger of this Land, after which B. enfeoffed the ſaid A. of the ſaid three Acres, now the Uſe ſhall be to the ſaid B. and his Heirs of the ſaid other Land, for the Statute ſo binds the Land to this Contingency when it happens, that by no means it can be defeated, and this is the cauſe that Leaſes made by force of Proviſoes compriſed in Aſſurances are good, and cannot be avoided, for the Intereſts to theſe Leaſes are wrought by the firſt Livery and the Statute, and therefore upon the matter, I conceive, that Judgment ought te be given for the Plaintiff.

Gawdy conceived that it is executed by the intent, but not by the letter of the Statute, for the purpoſe was to remove all the Eſtate from the Feoffée, and to put in Ceſtuy que Uſe wholly, to wit, in Poſſeſſion, to the Uſes which were in Eſſe, and in Alepance as to the Uſes which were to come and contingent; and now by the ſame Statute the Contingency of the Poſſeſſion ſhall go in Licence of the contingent Uſe, and now an Uſe limited to one for life, with Remainder over to the Heirs of the Body of I. S. or to the firſt Son of I. S. ſhall be in the ſame manner as if Land at this day had bèn letten to one for life, with Remainder over to the Heirs of the Body of I. S. or to the firſt Son of I. S. and not otherwiſe, for the quality which he had in the Uſe, the ſame (by the very letter of the Statute) he ſhall now have in the Poſſeſſion and Eſtate of the Land, and the Statute is not to undo any Uſe, but to tranſfer an Eſtate in the Land to the Uſe.

But he ſaid, That by the Feoffment made to Chriſtopher, the contingent Remainder which was deveſted in Strechley and John Chudleigh depending upon the Eſtate which Sir John Saintleger and his Co-feoffees had for the life of Chriſtopher, is utterly gone and deſtroyed in the ſame manner, as where a Leaſe is made for life, the Remainder to the right Heirs of J. S. or to the Heirs of the Body of J. S. if the Tenant for life dies, or aliens, whereby he makes a Forfeiture, and determines his Eſtate in the life of the ſaid J. S. his Heir ſhall never have the Land by the Remainder afterwards, becauſe he was not in Eſſe, as an Heir at the time when the Eſtate ended, for there cannot be a Remainder without a particular Eſtate, neither can it ſtand or be preſerved.

And as in this Caſe without a particular Eſtate of Free-hold, a Remainder cannot be, no more in the Caſe now in queſtion, being now become by means of the Statute, as if it had been an Eſtate executed in Poſſeſſion; and for this cauſe only he conceived, that Judgment ought to be given againſt the Plaintiff.

And Clench agréd with this Opinion in all, and both of them agréd, if there be none to take the Uſe according to the Limitation at the time, when it falleth to be in Poſſeſſion, that he ſhall never take it, although it happen to be in Eſſe afterwards.

Clark ſaid, that Uſes were not at Common Law, but grew by ſufferance of time, as appeareth by the words of the Statute it ſelf, and the miſchief and ſubtilty which was before this Statute was not in the Fine, Feoffment, or other Aſſurances of Land, but by means of the Uſes limited thereupon, contrary that which was uſed in the ancient courſe of the Common Law, and the Statute was made to reduce the Common Law to its ancient force and courſe, and therefore ought to conceive ſuch a Conſtruction, as may agree with the purpoſe of the Makers of the Statute, and therefore the beſt Conſtruction of this Statute is, not to execute other manner of Uſes, but in ſome Caſes to extinguiſh them, as where it is ſuch, as will make the Caſe in as ill, or worſe condition than it was before the making of the Statute.

It hath been agreed by all, that the Statute doth not execute any Uſe which was ſuſpended at the time of the making of the Statute, as by reaſon of a Diſſeiſor, or the like happening before; and if it doth not execute the Uſe which is in ſuſpence for the Right which he had in the Uſe, how can it execute the Uſe which hath not any being? for in ſuch Caſes of Infants not born as here, until they be in **Rerum natura**, the Uſe cannot have any Being.

And in the ſame manner in all Caſes where the Uſe is not to riſe but upon a future Contingent: And what good ſhall this Statute do, if theſe leaping Uſes ſhall ariſe without being impeached? Nothing, but always nouriſh a Viper in the Boſom of the Law, which is quite againſt the intent of the Makers of the Statute.

The Law was made to preſerve Peace amongſt the Subjects, and to aſſure their Poſſeſſions, as many other Statutes did, that were made about this time, as the Statutes of Fines, Wills, and others. But if the Expoſition of this Statute ſhall be as the other ſide hath taken it, it will make the Confuſion which will happen thereupon intolerable, and much worſe than it was before the Statute was made, and (as Walſh ſaid) if no Aſſurance can be made to be forcible againſt a contingent Uſe, this will make it worſe than it was before.

And he ſaid, that it was not to be compared to the intereſt of Lands to begin at a time to come, nor to the Caſe where a Man deviſe that his Land ſhall be ſold, in which Caſe, he ſhall not be impeached by any manner of Aſſurance, to be made in the mean time by the Heir, and the reaſon is, becauſe the Vendee takes by the Will under the Eſtate of the Heir, and not by the Sale, and therefore upon the matter, he conceived that the Plaintiff ought to be barred.

Periam ſaid, That Uſes were at Common Law, and to prove it, he vouched 24 H. 8. abridged in **Brook**. **And he ſaid**, That there have been always Truſts, **Ergo**, Uſes **ab initio**, but they had not ſuch eſtimation at the beginning as they have had by continuance of time, and ſo it was of Copy-holds: And theſe Uſes at Common Law bind but in privity according to the Truſt, but do not bind in the Poſſeſſion of him who cometh to the Land in the Poſt: But now by the Statute all Truſts are gone, and the Eſtate of the Land it ſelf transferred to the Uſe, and now the Uſe guides the Land, and not the Land the Uſe.

And the Statute did not intend to deſtroy any Uſe, but to bring it back to the Poſſeſſion, according to the courſe of the Common Law, and to avoid the Fraud.

And as before the Statute the Uſe it ſelf in ſuch a Caſe of Contingency was in Obeyance for the time, ſo now the Eſtate it ſelf is in Obeyance by the Statute, which wills, that he ſhall now have an Eſtate in the Land it ſelf, of ſuch a quality as he had before in the Uſe; for the Statute puts all clearly out of the Feoffees, and it is not inconvenient to have a Poſſeſſion ſo to a contingent Uſe, and if it had not been in the words of the Statute, yet (as hath been ſaid) it ſhall be ſo taken by the intent of the Statute; for it never was the intent of the Makers of the Statute to do wrong to any by means of the Statute. And therefore he put the Caſe of **Cramner**, who made a Feoffment to the uſe of himſelf for his life, and after his deceaſe to the uſe of his Executors for years, this Eſtate for years is not now veſted in any, becauſe a Man cannot have an Executor during his life, and yet it remains as in the cuſtody of the Law, until there are Executors to take it.

And he ſaid, that the Caſe of the Lady **Bray** was as ſtrong to prove the Caſe in queſtion, to be, as he takes it, which cannot be anſwered, for if ſhe had married with the Lord **Bray** by the Aſſent of the Council aſſigned for it, according to the Agreement, ſhe had taken an Eſtate by the Contingency, but in as much as ſhe did not do it, it was otherwiſe.

And we are to conſider well, what we do in this Caſe, it is a Tree, the Branches whereof over-ſhadow all the Poſſeſſions of the Realm in effect, for

the Eſtates and Leaſes in manner of all ſtand upon thoſe Aſſurances to Uſes, and to pull up ſuch a Tree by the Roots, is to put all the Realm in a Confuſion, and therefore if there be any miſchief therein, it is better to help it by Parliament, than to alter it by Judgment. And ſo upon the whole matter, I conceive that Judgment ought to be given for the Plaintiff.

Anderſon, That an Uſe was not at Common Law, for the Common Law had no reſpect to it, but to the Feoffee, and it was the Perſon who by the Law had any thing to do in the Land, and not **Ceſtuy que Uſe**, for he might puniſh **Ceſtuy que Uſe** for his medling with the Land, and **Ceſtuy que Uſe** had no Remedy againſt him by no means; But by **Subpœna** in the Court of Conſcience.

And further, an Uſe being limited to another in Fee, no Uſe can be limited further thereupon for any Eſtate. And it hath bin well ſaid, that the letter of the Statute of 27 H. 8. did not tend to execute this Uſe which was not in Eſſe, and for the intent thereof that it did not tend to execute any contingent Uſe until that it happen, which is proved by the Caſe, that an Eſtate for years being aſſigned over, or granted to an Uſe, the Uſe of this is not executed by the Statute of 27 H. 8. as it was agreed about 27 Eliz. and what was the reaſon in the Caſe, but becauſe there was not any Seiſin in the Uſe, but only a Poſſeſſion to the Uſe: whereby the words of the Statute are much to be regarded. And here how can there be a Seiſin to the Uſe which is not? it cannot be, and therefore for the like reaſon, as in the other Caſe, it is never executed, nor ſhall be removed by means of ſuch an Uſe, until it happeneth to be an Uſe in Eſſe.

And for Brent's Caſe, I have always taken the better Opinion to be, that the Wife cannot take in the Caſe for the mean Diſturbance, notwithſtanding the Judgment which is entred thereupon, which was by Aſſent of the Parties and given only upon a Default made after an Adjournment upon the Demurrer, for he ſaid, that he had viewed the Roll thereof on purpoſe; and if it be, that ſuch a contingent Uſe be not executed until it happeneth to be in Eſſe, here it appeareth, that by the Feoffment Chriſtopher is in of another Eſtate which was not ſubject to the Uſe, becauſe he is in by Forfeiture and Wrong made to this Eſtate, and therefore not bound to the Uſe in Contingency, although he made it without Conſideration, and although he had notice of this contingent Uſe, and therefore this contingent Uſe utterly defeated before it had any Being.

But in all the Caſes put on the other ſide, it doth not appear that there was any thing done in diſturbance of theſe mediate Uſes before they happened, and therefore not to be compared to this Caſe, whereby he conceived that the Plaintiff ought to be barred.

Popham ſaid, That in as much as the manner of Aſſurance made by Sir **Richard Chudleigh** may ſeem ſtrange, and in ſome manner to touch the Reputation of the ſaid Sir **Richard** (who was a grave and honeſt Gentleman) to thoſe who hear it, and do not know the reaſon why he did it, which I remember to be this as I have heard, **to wit**, That the ſaid **Chriſtopher** had killed one **Buller** a Gentleman of good Reputation, whereupon he fled into **France**, and the ſaid Sir **Richard** doubting what would become of his Eſtate, if he ſhould die before he had ſetled his Land, and yet having a deſire to have power to undo the Aſſurance which he purpoſed to make, if he pleaſed, his Council then thought the beſt way to make and deviſe the Aſſurance, ſo, that ſuch an Eſtate of Inheritance might thereby be in him, which could not deſcend to the ſaid **Chriſtopher**, and yet ſuch, that he might thereby undo the Aſſurance made by the Recovery when he pleaſed, and yet ſuch alſo as ſhould never take effect in any of the Iſſues of his other Wives, to the prejudice of his right Wives, becauſe he never had a purpoſe to marry with any of theſe Wives.

And to that which hath bẽn touched by Periam, that this Limitation firſt made is a Fee-ſimple in Sir Richard, I conceive clearly the contrary, For if it ſhould be ſo, then no Uſe could be limited over upon this Fee-ſimple, as hath bẽn ſaid before, and therefore all the Remainder of the Caſe had bẽn to no end; but he ſaid, that it was an Eſtate-tail ſpecial in Sir Richard, and denied the Opinion of Ayſcough taken ſo in 20 H.6. and this by reaſon of the Stat. of Donis conditionalibus, which wills Quod voluntas donatoris ſecundum formam doni in charta doni manifeſte expreſſam de cætero obſervetur. And here it is expreſs, that the Heirs of Sir Richard begotten upon any of the ſaid Wives ſhall have the Land, and thereby it ſhall be underſtood that his Heirs ſhall be intended by common Intendment the Heirs by him. To which Opinion Anderſon agrẽd.

And for the matter, Popham conceived clearly that there was not any ſuch Uſe at Common Law as we commonly call an Uſe, and yet he acknowledged there were always Truſts at Common Law; but every Truſt is not to be ſaid an Uſe: for none will doubt but that a Truſt may be, and is many times put in others at this day, as upon Purchaſes made in other Men's names, and Aſſurances alſo upon Truſt, and yet we will not ſay that this is an Uſe, and without doubt ſuch Truſts were at Common Law, but not the Uſes aforeſaid, and the reaſon that moved him to take the Law to be ſo, was, that he had not ſeen any ancient Record, Statute, or Book of Law, nor any Writing before the time of E. 3. which made any mention of this word Uſe; and if it had been at Common Law, without doubt (as they ſaid) ſome mention would have been made thereof. The reaſons which are alledged in 27 H. 8. and in the Caſe vouched 24 H. 8. that a Truſt was at Common Law is, by the one of them the Cauſa Matrimonii prælocuti, which (as they pretend) ought to prove that there was a Truſt at Common Law.

And the other the Statute of Marlbridge, that the Lord in Caſe of Wards againſt Feoffments made by Colluſion, which Feoffments (they alledge) prove that a Truſt then was.

To which it was ſaid, that the Gift made by a Woman to another, to the intent that he ſhall marry her, hath in it a Condition more properly implied, to wit, that if he does not marry her, that ſhe ſhall have her Land back again, for which the Common Law gives her Remedy by the Action aforeſaid, for if it had been but a Truſt, no Remedy had been by the Common Law.

And for the Statute of Marlbridge the contrary thereunto is manifeſtly proved, for the Statute ſpeaks but of Feoffments made to Heirs Apparent or upon Condition, or to the intent to enfeoff the Heir at his full Age, or the like, in which Caſes the Uſe always goes with the Poſſeſſions, and is not to the Feoffor: And the Statute of 4 H. 7. was made in vain, which gives the Wardſhip of Ceſtuy que uſe where no Will is declared, which had not been needful if Feoffments within the Statute of Marlbridge had been ſaid to have been to Uſes.

And without doubt if thoſe who made the Statute of Marlbridge had then had knowledge of theſe Feoffments to Uſes which were ſo miſchievous, and more than the other Feoffments by Colluſion, they then would have provided Remedy for theſe Caſes of Uſes.

Alſo the Statute de Religioſis ordains that Nec arte, nec ingenio, Lands ſhall not be conveyed in Mortmain, and thereby it was conceived that a full Proviſion had been made againſt theſe Mortmains, and yet in 15 R. 2. Proviſion was made againſt Uſes conveyed in Mortmain to Religious or other Corporations of which they took the Profits.

And

And without doubt thoſe who were ſo preciſe in the making of the Statute of Religioſis againſt Mortmains, would alſo have made Proviſion for the Uſes if they had then bèn known.

But to clear this Point, without all controverſie the Statute it ſelf of Uſes, 27 H. 8. makes it plain, which ſaith expreſly that by the Common Law of the Realm, Lands or Tenements ought not to paſs from one to another, without ſolemn Livery, matter of Record, or Writing, and that theſe Feoffments to Uſes were Errors uſed and accuſtomed within the Realm, to the Subverſion of the ancient Laws; therefore it ſtands not with the ancient Common Law of the Realm, as all the Parliament took it, which is more to be regarded than any Book vouched. But ſée how, and when they began and crept in at Common Law, and it ſhall be eaſily perceived (as it hath bèn well ſaid by ſome of thoſe who argued to this Point at the beginning) that they began by two means, to wit, by Fraud, and by Fear. And he ſaid, that the firſt Book which he had ſeen in all the Books of the Law, which tend to an Uſe, is the Caſe of 8 Aſſiſe, which makes mention that the Conuſee of a Fine entred into the Land in the Right of another, which is to be taken to another's Uſe. And in the Quadrageſimas of Edw. 3. mention is made of the Feoffees of the Lord Burglaſh, who ſued to the King by Petition, and by the Statute of 50 E. 3. cap. 6. mention is made that divers gave their Lands to their Friends to have the Profits, and afterwards fled to privileged places, and lived there to the hindrance of their Creditors; And therefore it was provided that in ſuch a Caſe Execution ſhall be made, as if no ſuch Aſſurance had been made. And by 2 R. 2. theſe are called Feoffments to Uſes, and made by Craft to deceive Creditors, and there is the firſt mention which is made in any Statute of the Word (Uſe:) So Fraud hath been always the chief foundation of theſe Uſes; yet in time they began to have ſome Credit in the Law. And this was when men ſaw that the Court of Conſcience gave Remedy in theſe Caſes againſt ſuch who had not the Conſcience themſelves to perform the Truſt put in them, and to take away the danger which happened to an infinite number of good Subjects, upon the Garboyls which happened between the time of E. 3. and that of King H. 7. cauſed that in effect, all the Poſſeſſions of the Realm were put in Feoffments to Uſes. And the firſt Caſe in the Law which ſpeaks of this word (Uſe) which he ever ſaw was (as he ſaid) in 5 H. 4. And the like Caſe by Gaſcoign, 7 H. 4. no Remedy is given by the Law for Ceſtuy que uſe, and afterwards it crept into the Law as appeareth, yet as an Error of long time uſed: And if before the Statute of 27 H. 8. a Leaſe had been made for life, the Remainder in Fee to the uſe of B. for life, the Remainder to the uſe of the firſt Son of the ſaid B. and ſo further as here:

If the Tenant for life had made a Feoffment in Fee to a Stranger, and had not given the Stranger notice of the Uſe, and all this were without Conſideration, and afterwards he in the Remainder in Fee to the Uſe had releaſed all his Right to the ſaid Stranger, every one of them had been hereby without Remedy for their Uſes: Were the Son of B. born before or after this Wrong done: So if it were at Common Law before this Statute as hath been well ſaid, and the Law being ſo before this Statute, then he ſaid it was to be ſeen what was to be done in the Caſe after the Statute, which will ſtand altogether upon this, what will become of theſe contingent Uſes to the Sons not born at the time of the ſaid Feoffment made by Sir John Saintleger and his Co-feoffees, by this Statute of 27 H. 8. and it ſeems to him clearly that no Poſſeſſion is executed to any contingent Uſe by this Statute, until it comes in Being; and that as the Caſe is here and in ſome other ſpecial Caſes it ſhall never be executed: And one cauſe why ſuch a contingent Uſe ſhall not be executed, is, becauſe it doth not ſtand with the letter of the Law, but rather is againſt the letter.

Another

Another Cauſe is, becauſe it is utterly againſt the intent of the Law to execute it, as the Caſe is here. It doth not ſtand with the letter of the Statute, for this is, Where any Perſon or Perſons ſtand ſeiſed to the uſe of any other Perſon or Perſons, &c. And it is clear that none can ſtand ſeiſed to the uſe of him who is not, neither can he who is not in rerum natura have any Uſe, therefore the Caſe here doth not ſtand with the letter of the Statute to be now executed.

And further, the words following are, that in every ſuch Caſe, every Perſon who hath ſuch an Uſe in Fee-ſimple, Fee-tail, for life, for years, &c. or otherwiſe in Remainder or Reverſion ſhall ſtand hereafter ſeiſed and adjudged in lawful Eſtate and Poſſeſſion of the Lands, &c. of ſuch an Eſtate as he had in the Uſe: The words then in the Statute being ſo preciſe as they ſtand, to wit, that in ſuch Caſe he who hath ſuch an Uſe ſhall have the Poſſeſſion executed of ſuch an Eſtate as he had in the Uſe, excludes all other who are not in it, to have it to be executed until that they happen to be in the ſame Caſe as of that which the Statute ſpeaks. And if they had intended to have the Poſſeſſion to be executed and transferred from the Feoffées to theſe contingent Uſes, they would have made ſome mention thereof as well as they did of Reverſions and Remainders, and they did not leave there, but mention this again, to wit, that the Eſtate, Right, Title and Poſſeſſions which was in ſuch Perſon or Perſons which were ſeiſed to the uſe of any ſuch Perſon or Perſons, ſhall be hereafter clearly adjudged in him, or thoſe that had or have ſuch Uſe according to ſuch quality, manner, form and condition as he had before the Uſe which was in them, by which it appeareth plainly, that the Right and Poſſeſſion of the Feoffée ſhall not be veſted in or to any, until that he hath the the Uſe it ſelf; for it is ſaid, that it ſhall be in him, therefore they ought to have ſomething in the Uſe by the very expreſs Letter of the Statute, before any thing of the Poſſeſſion ſhall be executed or transferred by this Statute from the Feoffée to Ceſtuy que uſe: And how can this be ſaid to be within the letter of the Statute, which hath ſo many and ſo preciſe words and branches againſt it. And therefore it is clear, that if the Feoffée to Uſe were ſeiſed at the time of making of this Statute, that the Uſe ſhall not be executed by this Statute, until there be a Regreſs made by the Feoffée, or in his Right to revive the former Uſe, and it had been out of the letter of the Statute.

But to this I ſay, that how preciſe ſoever the Letter is againſt the Execution of theſe contingent Uſes, the intent thereof is yet more ſtrong and preciſe againſt them, which I will prove clearly by the Statute it ſelf, which is of greater Authority than the particular Opinion or Conceit of any Judge whomſoever, for it is the Judgment of all the Judges, and all the Realm alſo which ought to bind all, and to which all ought to give Credit. And to take the intent, the Statute was full that it was made (as is reherſed) for the Diſinheriſon which before was to true Heirs; for the defect which before was in the aſſurance of Purchaſes, for the Miſchiefs, in regard before Men did not know (by reaſon of theſe Uſes) againſt whom to bring their Actions to recover their Rights. To avoid Perjury that it ſhould not be ſo common as it was, by reaſon of the maintenance and ſupport of theſe ſecret Uſes, for the relief of the King and other Lords, as to their Eſcheats, Forfeitures, Wardſhips, Releaſes, and the like, for the miſchief which before happened to Tenants by the Courteſie, and in Dower, by reaſon of theſe Eſtates in Uſe; and finally for the great Inconveniences which happened by reaſon of them, to the great trouble and unquiet of the People: Theſe were the great miſchiefs that were before the making of the Statute, and theſe were the things for which the Statute intended to provide Remedy, and if the Expoſition ſhall be as hath been on the other ſide, theſe miſchiefs ſhall be on every part more miſchievous by much, than it was before the making of the Statute, and that in ſuch a manner, that it ſhall be impoſſible to help any of them but by Parliament; whereas always the good and true Conſtruction of a Statute is to

conſtrain

conſtrain it, ſo that it ſhall give Remedy to the miſchief which was before, and not to make it more miſchievous, and therefore examine it by Parts.

And as to the Diſ-inheriſon of two Heirs, it appears now that by ſuch Expoſition more inconveniences will ariſe, and that in a more dangerous degrée than before the Statute; for before, for the Uſe the Heir had his Remedy in Conſcience according to the Truſt, and he might have made a Diſpoſition of the Land it ſelf, by the Statute of R. 3. as an Owner, for the advancement of his Wife and Children, and for payment of his Debts, and the like. But as the Caſe is now uſed by means of theſe Perpetuities (as they are called) if the Expoſition of the other ſide ſhall hold place, the true Heir ſhall not only be continually in danger to loſe his Inheritance, but by them the very Bowels of Nature it ſelf ſhall come to be divided, and as wrent in pieces, for by reaſon of theſe the Inheritants themſelves cannot make any competent Proviſion for the Advancement of their Wives, Daughters, or youngeſt Sons, as every one according to the courſe of Nature ought to do, nor by reaſon of this can he redéem himſelf if he were taken Priſoner: And this will make Diſobedience in Children to their Parents, when they ſée that they ſhall have their Patrimony againſt their Will, whereby ſuch Children often times become unnatural and diſſolute, of which I in my time have ſéen many unnatural, dangerous and fearful Conſequences, not convenient to be ſpoken of. And it ſtays not there, but it cauſeth mortal debate (as to Blood) between Couſin and Couſin, Brother and Brother, and not ſo only, but between the Father himſelf and his Children, of which every one of us have ſeen the experience, for the one ought to be as a watch upon the other, to ſee when any thing happen to be done, to give him advantage to diſ-inherit the very true Owner.

And I ſay, that it is impoſſible that any can keep his Poſſeſſions which hath them tied with theſe Perpetuities, if the Expoſition of the Statute ſhould hold place which the other ſide hath made. And I affirm preciſely, that there is not any one in England who hath had ſuch Poſſeſſions ſo bound by Deſcent of Inheritance by five years of any value, but that he hath loſt all, or part of his ſaid Land at this time, let him be never ſo preciſe in making his Aſſurances, and yet he is not ſure to have one skilful in the Law always at his Elbow when he is to meddle with his Land. And therefore I put but this Caſe.

One who hath ſuch a Perpetuity with power to make Leaſes, rendring the ancient Rent, or more, hath two Farms, either of them of the ancient Rent of 20 s. a year, but the one is worth 60 l. a year, and the other but 20 l. theſe are in hand to be better together, rendring 53 s. 4. for both together, therefore he hath loſt all, or part of his Land, according to that of which the Perpetuity is; ſo it is evident that it will happen to be more miſchievous in time to come, and therefore by this Expoſition much more to the Diſ-inheriſon of the Heir, than it was before the making of this Statute. And which is more miſchievous, if a **Feme putein** happen to be in ſuch an Houſe who happen to have Children in Adultery, theſe Baſtards ſhall have the Land againſt the Will of the Father, to the utter diſinheriſon of the true Heirs, and againſt the intent of him who made the Limitation, by which we may ſee the juſt Judgment of God upon theſe who attempt by Humane Policy to circumvent the Divine Providence of God for the time to come; and of this alſo I have ſeen an Example.

And now to the Miſchief, that Men do not know againſt whom to bring their Actions to ſue for their Rights, and it is clear, that now by ſuch an Expoſition they ſhall be now in much worſe Condition than they were before, for before the Action was given againſt him who received the Profits, which is now gone by this Statute in the Caſes of Free-hold, and therefore if the other Expoſition ſhall hold place, it is clear that until the Statute of 13 Eliz.

Men

Men might have been by means of this Statute put out of all Remedy to recover their Rights by any manner of Action, as ſome put it in practice, as to make Feoffments to the uſe of the Feoffor, and his Heirs, until any intend to bring an Action againſt him for this Land, and then over to others upon the like Limitation, with a Proviſo to make it void at his pleaſure, and the like, and what miſchief ſhall then be for the time upon ſuch an Expoſition? ſuch, that Juſtice thereby cannot be done to the Subject; and what an abſurdity ſhall it be to ſay, that ſuch an Expoſition can ſtand with the intent of the Makers of the Law?

And to that which hath bẽn argued on the other ſide, and firſt to that which was ſaid by Walmſley, That the Right, Eſtate and Poſſeſſion is wholly out of the Feoffee, and veſted to the Uſes, which have their Being by the Statute, and that upon the Contingents happening, their Eſtates uncouple and give place to the contingent Uſe then executed, and that the Execution thereof ſhall be by a Poſſeſſion drawn to it out of the Poſſeſſion which was before executed by the Statute in another: I ſay, that this Statute can by no means have ſuch an Expoſition; for this is as much as to ſay, that an Uſe may ariſe upon an Uſe, contrary to what is adjudged, 36 H. 8. That a Bargain and Sale by a Deed indented, and enrolled, cannot be at this day of Land to one, to the Uſe of another.

And if a Man enfeoff another to the uſe of J. S. and his Heirs, and if J. N. pay ſuch a ſum, that then the ſaid J. S. and his Heirs ſhall be ſeiſed of the ſame Land to the uſe of the ſaid J. N. and the Heirs of his Body: J. N. pays the Money, yet the Uſe doth not riſe out of the Poſſeſſion of the ſaid J. S. But if it had been, that upon the payment the firſt Feoffee and his Heirs ſhall ſtand ſeiſed to the uſe of the ſaid J. N. and the Heirs of his Body, it ſhall be otherwiſe; therefore ſomething remains to the firſt Feoffee in the Judgment of the Law.

And I remember, that when I was a Counſellor at Law in the time of the Lord Dyer, where a Feoffment was made to the uſe of one for life, with Remainders over, with reſtraint to alien, and with power given to Tenant for life to make Leaſes for one and twenty years, or three Lives, it was much doubted whether this power ſo limited to him without words in the Aſſurance that the Feoffee and his Heirs ſhall ſtand ſeiſed to theſe Uſes, ſhall be good to make ſuch Leaſes, or not? And therefore ſuppoſe that a Man bargains and ſells Land to one for his life by Deed indented and enrolled, and make therein a Proviſo, that the Tenant for life may make ſuch Leaſes, this is to no purpoſe as to power to make a Leaſe, but the ſtrongeſt Caſe which he put was, that of 30 H. 8. which I agreed to be Law, as it is there put, whether it were before or after the Statute of 27 H. 8. for it is not there put that the Feoffment was made upon any Conſideration to the Stranger, in which Caſe, although he had no notice of the firſt Covenant, yet in ſuch a Caſe he ſhall take the Poſſeſſion ſubject to the Uſe, to which it was bound by the preſent Covenant: But if you conſider the Caſe well, you ſhall ſee that it was a Caſe before the Statute, for it followeth preſently in the ſame Caſe, that it is there ſaid, that it is not like the Caſe where the Feoffees in Uſe ſell the Land to one who hath no notice of the firſt Uſe, whereby it appeareth that it was a Caſe before the Statute, for otherwiſe there had been no cauſe to have ſpoken then of the Feoffees to an Uſe, and by the ſame it appeareth, if the Covenanter had bargained and ſold the Land to another, the ſame Uſe had never riſen upon the Covenant, and therefore it is clear againſt the Law, that the Poſſeſſion ſhall be bound with ſuch an Uſe in whoſoevers hand it comes.

And to that which Periam **ſaid, in the Caſe of theſe contingent Uſes, they ſhall now by the Statute be in the ſame degrẽ, as if Land it ſelf had bẽn ſo conveyed**; and that now the Land ſhall be in Contingency inſtead of the Uſe, and that by ſuch manner it ſhall be executed, and that by ſuch means all is utterly out

of the Feoffees, becauſe the Statute was made to determine all matter of Truſt to be hereafter repoſed in any Feoffee: this is well ſpoken, but not well proved; for as I have ſaid before, it is an Expoſition quite contrary to the letter and intention of the Law. And I agree, as hath been ſaid, if there be none to take the Uſe at the time that it falleth to be in Poſſeſſion, according to the Limitation, that he ſhall never take it afterwards, no more of an Uſe upon the Statute than of an Uſe at Common Law: As if an Uſe be limitted for life, the Remainder to the right Heirs of J. S. if the Eſtate for life be determined in the life of J. S. the Remainder ſhall never veſt afterwards in the right Heirs of J. S. no more than if an Eſtate had been ſo made: But this makes for me, to wit, that the Eſtate upon the Uſes executed by the Statute, ſhall be of the ſame condition as Eſtates in Poſſeſſion were at Common Law, and that they being executed ought alſo to be ſuch, of which the Common Law makes Allowance.

And by way of Argument, I agree for the time that it is, as hath been ſaid by them who maintain that an Uſe may be in ſuſpence, as to that which is an Uſe in its proper nature, for it is not properly ſaid an Uſe, until that it be ſaid in Eſſe, to take the Profits themſelves: But I am to return this Argument againſt him who made it; for if it be ſo, the Uſe can never be in ſuſpence, and if ſo, it follows that no Poſſeſſion by means of any ſuch Uſe can be in ſuſpence, but ſtays where it was before to be executed when the Uſe happens to be in Being.

But as to that, that a Reverſion or Remainder may be of that which we call an Uſe, ſo alſo may ſuch an Uſe be in ſuſpence in the ſame manner as the Poſſeſſion it ſelf, but not otherwiſe.

And as to Cramner's Caſe formerly put, the Law is ſo, becauſe nothing appeareth in the Caſe to be done, to the diſturbance of this contingent Uſe in the interim before it happen. But upon the Caſe put of the Lady Bray, upon which it hath ſo ſtrongly relied, it was thus.

The Lord Bray made an Aſſurance of certain Lands, to the uſe of certain of his Council, until the Son of the ſaid Lord Bray ſhould come to the age of 21 years, for the Livelyhood of the ſaid Son, and of ſuch a Wife as he ſhall marry with the aſſent of the ſaid Council, and then to the uſe of the ſaid Son and of the ſaid Wife, and of the Heirs of the Body of the ſaid Son: The Father dies, the Son was become in Ward to the King, after which one of the ſaid Counſellors dies, the King grants over the Wardſhip of the ſaid Son, after which the ſaid Lord Bray by the aſſent of his Guardian, and of the ſurviving Counſellors marries the Daughter of the then Earl of Shrewsbury, after which the Husband aliens the ſame Land to one Butler, and dies, and upon Action brought by the ſaid Lady againſt the ſaid Butler for the ſame Land, ſhe was barred by Judgment, and upon what reaſon? becauſe ſhe was not a Perſon known when the Statute was made, which muſt be in every Caſe of a Freehold in Demeſn, as well in caſe of an Uſe, as in caſe of a Poſſeſſion.

And therefore a Leaſe for years, the Remainder to the Heirs of I. S. then living, is not good, and the ſame Law of an Uſe. And ſo it was agreed by all the Juſtices very lately in the Caſe of the Earl of Bedford, but in theſe Caſes it remaineth to the Feoffor; and becauſe it doth not appear at the time of the Aſſurance who ſhall be the Wife of the ſaid Son, ſo that there was not any to take the preſent Free-hold by name of the Wife of the Son, ſhe takes nothing by the Aſſurance, but this Reaſon makes for our ſide; to wit, That if there were none to take the Free-hold in Demeſn from the Uſe, when it falleth, he ſhall never take it.

The other Reaſon in this Caſe was, becauſe ſhe was not married by the conſent of all the Counſellors, for that one was dead, nor according to the power given by the Agreement, but by the Authority of the Guardian, that the power which the Father had upon his Son was ceaſed.

And

And Nota, That by a Diſſeiſin the contingent Uſe may be diſturbed of his Execution; but there by the regreſs of the Feoffée or his Heirs when the Contingent happen it may be revived to be executed: But by the Releaſe of the Feoffée or his Heirs, the Contingent in ſuch a Caſe by Popham is barred of all poſſibility at any time to be executed.

And to that which hath bèn ſaid, that the general and univerſal Aſſurances of Men throughout all the Realm at this day are by means of Uſes, and that it ſhall be a great deal of danger and inconvenience to draw them now in queſtion or doubt, and that it now trencheth upon all the Poſſeſſions of the Realm, and therefore it ſhall be too dangerous to pull up ſuch Trées by the Roots, the Branches whereof are ſuch, and ſo long ſpread, that they overſhadow the whole Realm.

Popham ſaid, That they were not utterly againſt Uſes, but only againſt thoſe, and this part of them which will not ſtand with the publick Weal of the Realm, and which being executed ſhall make ſuch an Eſtate which cannot ſtand with Common Law of the Realm, or the true purport of the Statute; and therefore he ſaid, that it was but to prune and cut off the rotten and corrupt Branches of this Tree, to wit, that thoſe which had nor their Subſtance from the true Sap, nor from the ancient Law of the Realm, nor from the meaning of the Statute, and ſo to reduce the Tree to its Beauty and Perfection.

The ſame Reaſon he ſaid, might have bèn made in the time of Edw. 4. againſt thoſe Arguments which were made to maintain the common Recoveries to bar Eſtates Tail. But if ſuch a Reaſon had bèn then made, it would have been taken for a bare Conceit and meer Trifle, and yet Uſes were never more common than Eſtates Tail were between the Statute of Donis conditionalibus, and the ſaid time of E. 4. But the grave Judges then ſaw what great trouble happened amongſt the People by means of Intails, and what inſecurity happened by means thereof to true Purchaſors, for whoſe ſecurity nothing was before found (as we may ſee by our Books) but collateral Warranty, or infinite delay by Voucher; and thus did the Judges of this time look moſt deeply into it, whereupon, upon the very Rules of Law it was found that by common Recovery with Vouchers theſe Eſtates Tail might be barred, which hath been great cauſe of much quiet in the Land until this day, that now it begins to be ſo much troubled with the Caſes of Uſes, for which it is alſo neceſſary to provide a lawful Remedy.

But he ſaid plainly, That if the Expoſition made on the other ſide ſhall take place, it will bring in with it ſo many miſchiefs and inconveniences to the univerſal diſquiet of the Realm, that it will caſt the whole Commonwealth into a Sea of Troubles, and endanger it with utter confuſion and drowning.

And to that which was ſaid, That a Remainder to the right Heirs of J. S. or to the Heirs of the Body of J. S. or to the firſt Son, as here are, ſo in the cuſtody of the Law that they cannot be drawn out, and that therefore no Forfeiture can be made by the Feoffment made by him who hath the particular Eſtate.

To that he ſaid, That a Diſſeiſin made to the particular Eſtate for life draws out ſuch Remainders to the right Heirs, as is proved expreſly by 3 H. 6. where it is holden, that a Collateral Warranty bars ſuch a Remainder in Obeyance after a Diſſeiſin.

And by Gaſcoigne, 7 H. 4. If ſuch a Tenant for life makes a Feoffment in Fee, it is a Forfeiture, but he conceived that in the life time of J. S. none can enter for it, but this is not Law; and when by the Feoffment the particular Eſtate is quite gone in Poſſeſſion, and in Right alſo, the Remainder ſhall never take effect, by the very Rules of Littleton.

And by 27 H. 7. which is, That the Remainder cannot be, unleſs there be an Eſtate upon which it may have dependency, which there it cannot; but in the Caſe of a Diſſeiſin made to a particular Eſtate, it is otherwiſe, becauſe there the

Eſtate remains in Right. And to ſay that it ſhall not be a Forfeiture, becauſe the Feoffment was made to **Chriſtopher**, who then had the Fee-ſimple which was limited to the right Heirs of Sir **Richard Chudleigh**, this is not ſo, for by 41 **E.** 3. The Tenant for life himſelf, who alſo had a Remainder in Fee-ſimple in himſelf, depending upon a mean Eſtate Tail in another made a Feoffment, and by it committed a Forfeiture to him in the Remainder in Tail.

But if Tenant for Life, Remainder in Tail, Remainder in Fee, enfeoff him in the Remainder in Tail, this is a Surrender of his Eſtate for the immediate Eſtate which was in him; whereupon this Term, Judgment was given in the King's Bench for **Fraine** the Defendant, againſt **Dillon** who was Plaintiff. And it is entred, **Hill. 31 Eliz. Rot. 65.**

Bayne's *Caſe.*

10. AT the Seſſions holden at **Newgate** preſently after this Term the Caſe was this; one **Waynes** with another came in the night time to a Tavern in **London** to drink, and after they had drank, the ſaid **Waynes** ſtole a Cup in which they drank in a Chamber of the ſame Houſe; the Owner of the ſaid Houſe, his Wife and Servants then being alſo in the Houſe, and the Cup being the Owner's of the ſaid Tavern, whereupon he was indicted and committed, and this matter appeared in the Indictment, and agreed by **Popham, Anderſon** and **Periam**, with the Recorder and Serjeants at Law then being there, that this was not Burglary, and yet it was ſuch a Robbery, whereby he was ouſted of the benefit of his Clergy by the Statute of 5 **E. 6. cap. 9.** and was hanged.

Burglary.

11. AND at the Seſſions then next enſuing then holden, upon one who had ſtolen a Silver Baſon and Ewer of the then Biſhop of **Worceſter**, and Sale made openly in the day in a Scrivener's Shop in **London** to a Stranger, the Queſtion was demanded of the Court whether the Property were changed by this Sale, ſo that the Biſhop ſhall not have his Plate again, becauſe it was alledged that they preſcribed that every one of their Shops in **London** are good Markets overt through all **London** every day in the Week but **Sunday**; But agreed by **Popham, Egerton, Anderſon, Wian**, and others skilful in the Law then being there, that ſuch a general Cuſtom is not good, and that this Sale made there, albeit it were openly in the Shop, ſo that every one paſſing by might ſee, it ſhall not bind the Property as it ſhall do in Market overt; for a Scrivener's and Cutler's Shop, or the like, is not proper for the Sale of Plate, nor a place to which men will go to ſeek for ſuch a thing loſt or ſtole; But a Gold-ſmith's Shop is the proper Shop for it, as the Draper's Shop is for Woollen Cloth, or the Mercer's Shop for Silk, and the like: and to ſuch Men will go to ſeek for things of the like nature that are loſt or ſtollen, and not to a Scriveners Shop, or the like.

In which Caſe Shops in London *are Markets Overt, and what not.*

And they agreed alſo that a private Sale made in the Shops which are proper to the nature of the thing ſold, ſo that the Paſſers by cannot in Reaſon ſee it in their paſſage, cannot bind, for Reaſon (upon which the Law is founded) will not admit any ſuch Cuſtom.

Hilary

Hill. 37 *Eliz. in the King's Bench.*

Weſtby *verſus* Skinner *and* Catcher.

1. IN Debt by Titus Weſtby **Plaintiff, againſt** Thomas Skinner **and** John Catcher, **late Sheriffs of** London, **Defendants, for** 440 l. **upon** Nihil debet **pleaded, and a ſpecial Verdict found, the Caſe appeared to be this, to wit,** One **Anthony Buſtard** with others, were bound in a Recognizance in the nature of a Statute-ſtaple of 440 l. to the Plaintiff, whereupon the Plaintiff ſued Execution out of the **Chancery** againſt the ſaid **Anthony** and the others that were bound with him for the Bodies, Goods and Lands of the ſaid Obligors which Writ of Execution was delivered to the ſaid Defendants the 8th day of **September,** 30 **Eliz.** the Defendants then being Sheriffs of **London,** and the ſaid **Anthony** being then in **Newgate** in Execution, in the Cuſtody of the ſaid Defendants for 240 l. at the Suit of one **Robert Deighton,** and that afterwards, to wit, the 20th day of **October** in the ſame year the ſaid Defendants were diſcharged and removed from their ſaid Offices, and **Hugh Offeley** and **Richard Saltonſtall** were then made Sheriffs of **London,** and that the ſaid **Anthony** being in Execution for the one and the other Debt, the ſaid Defendant the ſaid 20th day of **October** by Indenture delivered the ſaid **Anthony** to the ſaid new Sheriffs in Execution for the ſaid Debt of the ſaid **Robert Deighton,** not giving them any notice of the ſaid Execution made for the Plaintiff, and ſuffered the ſaid **Anthony** to go at large: **And whether the Defendants ſhall be charged for this Eſcape was the queſtion.**

See this Caſe in *Coke,* 3. Report. *fol.* 71. 6.

Priſoners in Execution to be delivered over to the new Sheriff by Indenture, and all the Executions to be therein moved

And the Eſcape was alledged by the Declaration to be ſuffered by the ſaid Defendants the ſaid 20th day of October, 30 Eliz. **and it was moved by** Tanfield, **that the new Sheriffs ought to take notice of their Priſoners remaining in the Goal, at their coming into their Office, at their peril, and ought to enquire and ſearch for the Cauſes that they then were in Cuſtody, and not to deliver them of their own head without due courſe of Law.**

And he put the Caſe, That if the old Sheriff had been dead, in the mean time before the new Sheriffs had been made, ſhall this be an excuſe to the new Sheriffs that they had no notice for what cauſe this Anthony **had been in Priſon, if they ſuffer him to eſcape? And he ſaid that it ſhall not, no more here; but** per Curiam **the new Sheriff ſhall not be charged with this Eſcape, as to the** 440 l. **of which they had no notice; for if this Caſe which was private in the knowledge of the ancient Sheriff only upon a Writ directed to them at the Suit of any Party, the new Sheriffs cannot by Indentment have any knowledge, unleſs it be given to them by the old Sheriffs, to whom the Writ of Execution was directed and delivered.**

And the Caſe of one Dabridgecourt, **who was Sheriff of** Warwick, **and had one in Execution whom he kept in a private Priſon by himſelf, for all his Executions in the Town of** Warwick; **and when he was diſcharged of his Office, and a new Sheriff made,** Dabridgecourt **ſaid to the new Sheriff,** That he had ſuch an one in Execution in his Cuſtody, and offered to the ſaid Sheriff to put him in the Indenture amongſt his other Priſoners delivered to the new Sheriff, but would have had the ſaid old Sheriff to have ſent for the ſaid new Sheriff to have taken him into his Cuſtody, but the new Sheriff refuſed to receive him, unleſs **Dabridgecourt** would deliver him into the common Goal of the County, which was in the Town of **Warwick,** whereupon afterwards the Priſoner eſcaped: **And** Dabridgecourt **was charged with this Eſcape, and not the new Sheriff, for he is not compellable to take the Priſoners of the Delivery of the old Sheriff, but in the common Goal of the County, and the old Sheriff remains chargeable with the Priſoner, until he be lawfully diſcharged of him, and if the Sheriff dies, the Party ſhall be rather at a prejudice, than the new Sheriff,**

riff, without Cauſe charged with him. And in ſuch a Caſe the Party who ſued the Execution may help himſelf, to wit, by the remanding of the Body by Corpus cum cauſa, whereby he may be brought to be duly in Execution, and lyes under a due Officer.

And Anderſon, Periam, and other Juſtices were alſo of Opinion, that the ſaid Skinner and Catcher are to be charged with the Eſcape in the principal Caſe, whereupon Judgment was given for the Plaintiff, which was entred, Hill. 34 Eliz. Rot. 169. in the B. R.

Fulwood *verſus* Ward.

2. IN a Writ of Annuity brought in the Common Pleas by George Fulwood Plaintiff, againſt William Ward Defendant, the Caſe was thus. The Queen was ſeiſed of a Barn and Tithes of Stretton, in the County of Stafford, for the life of the Lord Paget, and being ſo ſeiſed, demiſed it by Letters Patents, dated 21 June, 29 Eliz. to the ſaid William Ward for 21 years, whereupon the ſaid Ward by Writing dated, 30 June, 29 Eliz. granted to the ſaid Plaintiff an Annuity or yearly Rent of 10 l. out of the ſaid Barn and Tithes for 15 years then next enſuing, payable yearly upon the 8th day of November, with Clauſe of Diſtreſs. The Lord Paget died the firſt day of March, 32 Eliz and for the Arrearages after his death, the Plaintiff brought this Writ of Annuity, and for the difficulty thereof in the Common Pleas, the Caſe came this Term to be argued before all the Juſtices and Barons at Serjeants Inn in Fleet-ſtreet, where it was agreed by Walmſley, Fennor and Owen, that the Annuity was gone by the Determination of his Eſtate in the Land who made the Grant, for they ſaid that preſently upon the Grant made as before it was a Rent-charge, for by ſuch a Rent granted in Fée, the Fée ſhall be in his Heirs, albeit the Grantée dies before any Election made; and ſuch a Rent is payable from the beginning at the Land, as appeareth by 12 E. 4.

And by Grant of Omnia, terras, tenementa, & hereditamenta, ſuch a Rent will paſs, ergo, it is a Rent-charge and not an Annuity until the Election made, and by the Determination thereof in the nature of a Rent, the Election is gone, as by Babington and Martin, 9 H. 6. by the Recovery of Land charged with ſuch a Rent by elder Title, the Annuity is gone as it ſeems by their Opinion, and by them and by Littleton upon a Rent-charge granted with Proviſo, that he ſhall not charge the Perſon of the Grantor, it will exclude the Charge of the Perſon, which proves that the Land is charged Originally, and not the Perſon, for otherwiſe the Proviſo would be void for the Repugnancy; And if ſo, whenſoever the Land is diſcharged, as by Purchaſe, Deſcent, or the like, the Perſon thereby is alſo diſcharged, and therefore the Judgment here ſhall be, that the Plaintiff ſhall be barred.

But by the Chief Juſtices, chief Baron, and all the other Juſtices and Barons, the Plaintiff ought to have Judgment in this Caſe to recover the Annuity, for the Law gives him at the beginning an Election to have it as a Rent or an Annuity, which matter of Election ſhall not be taken from him, but by his own deed and folly, as in caſe where he purchaſe part of the Land charged, in which caſe by his own Act he hath excluded himſelf of his Election. But if a Feoffee upon Condition grant a Rent-charge, and preſently break the Condition, whereupon the Feoffor re-enter, ſhall not the Feoffee be charged by Writ of Annuity, ſurely it ſhall be againſt all reaſon that he by his own Act, without any folly of the Grantee, ſhall exclude the Grantée of his Election which the Law gives at the beginning.

And they denied the Opinion of 9 H. 6. to be Law; But if the Diſſeiſor grant a Rent-charge to the Diſſeiſee out of the Land which he had by the Diſſeiſin

Diſſeiſin by his Re-entry, before the Annuity brought, the Annuity is gone; for this was his own Act, yet in effect all of them agreed, that Prima facie, it ſhall be taken as a Rent-charge, of which the Wife ſhall be endowed, as hath been ſaid, which paſs by Grant of Omnia hereditamenta, and which is payable at the Land; but the reaſon is, becauſe it is expreſly granted out of the Land, and alſo for the preſumption of Law, that it is more beneficial for the Grantee to have it in ſuch a degree, than in the other. But neither the preſumption of Law, nor the expreſs Grant thereof as a Rent, ſhall not take away from the Grantee the benefit of his Election, where no default was in him, but that upon his Election he may make it to be otherwiſe, as ab initio. And therefore by Popham, If a Rent-charge be granted in Tail, the Grantee may bring a Writ of Annuity, and thereby prejudice his Iſſue, becauſe that then it ſhall not be taken to be an Intail, but as a Fee-ſimple conditional, ab initio. And if a Termer for two years grant a Rent-charge in Fee, this as to the Land is but a Rent-charge for two years, and if he avow for it upon the Determination of the Term, the Rent is gone, but by way of Annuity it remains for ever, if it be granted for him and his Heirs, and Aſſets deſcend from him who granted it.

And if a Rent-charge be granted in Fee, and doth not ſay for him and his Heirs, if the Grantee brings his Writ of Annuity, the Heir ſhall never be charged therewith, yet if he had taken it as a Rent-charge, the Land had been charged with it in perpetuity.

And by him the cauſe why the Proviſo that he ſhall not charge the Perſon of the Grantor upon the Grant of a Rent-charge is good, is, becauſe the Perſon is not expreſly charged by ſuch a Grant, but by Operation of Law.

But in ſuch a Caſe, a Proviſo that he ſhall not charge his Land is meerly void for the Repugnancy, becauſe there the Land is expreſly charged by preciſe words, and therefore if it be expreſly compriſed in ſuch a Grant, that the Grantee may charge the Land, or the Perſon of the Grantor, at his Election; provided then afterwards that he ſhall charge his Perſon, is not good, Cauſa patet.

And all agreed, that upon a Rent granted upon equality of Partition, or for allowance of Dower, or for recompence of a Title, an Annuity doth not lye, becauſe it is in ſatisfaction of a thing real, and therefore ſhall not fall to a matter perſonal, but always remains of the ſame nature as the thing for which it is given. And afterwards the ſame Term Judgment was given in the Common Bench, that the Plaintiff ſhall recover, which is entred, &c.

And in the ſame Caſe Clark vouched that it was reported by Benloes in his Book of Reports; where a Rent was granted out of a Rectory by the Parſon who afterwards reſigned the Parſonage, that it was agreed in the Common Pleas in his time, that yet a Writ of Annuity lies againſt the Grantor upon the ſame Grant, to which all, who agreed on this part, agreed that it was Law.

Butler *verſus* Baker *and* Delves.

3. IN Treſpaſs brought by John Butler againſt Thomas Baker and Thomas Delves, for breaking his Cloſe, parcel of the Manor of Thoby, in the County of Eſſex, upon a ſpecial Verdict, the Caſe was thus. See this Caſe in *Coke* 3. Report 35.

William Barners the Father was ſeiſed in his Demeſn as of Fee, of the Manor of Hinton in the County of Glocester, holden of the King by Knights Service in Capite, and being ſo ſeiſed, after the Marriage had between William his Son and Heir Apparent, and Elizabeth the Daughter of Thomas Eden Eſq; in conſideration of the ſame Marriage, and for the Joynture of the ſaid Elizabeth, aſſured the ſaid Mannor of Hinton, to the uſe of the ſaid William the Son,

Son, and Elizabeth his Wife, and the Heirs of their two Bodies lawfully begotten and died; by whoſe death the Reverſion alſo of the ſaid Mannors deſcended to the ſaid William the Son, whereby he was ſeiſed thereof accordingly, and being ſo ſeiſed, and alſo ſeiſed of the Mannor of Thoby, in his Demeſn as of Fee holden alſo of the Queen by Knights Service in Chief, and of certain Lands in Fobbing in the ſaid County of Eſſex, which Land in Fobbing with the Mannor of Hinton, were the full third part of the value of all the Land of the ſaid William the Son, and he made his Will in Writing, whereby he deviſed to his ſaid Wife Elizabeth his ſaid Mannor of Thoby for her life, in ſatisfaction of all her Joynture and Dower, upon condition, that if ſhe take to any other Joynture, that then the Deviſe to her ſhall be void, and after her deceaſe he deviſed that the ſaid Mannor ſhall remain to Thomas his Son, and the Heirs Males of his Body, and for default of ſuch Iſſue, the Remainder to Thomas, Brother of the ſaid William, for his Life, the Remainder to his firſt, ſecond and third Son, and to the Heirs Males of their Bodies, and ſo to every other Iſſue Male of his Body; and for default of ſuch Iſſue, the Remainder to Leonard Farners his Brother, and to the Heirs Males of his Body, the Remainder to Richard Farners and the Heirs Males of his Body, the Remainder to the right Heirs of the Deviſor: William the Son dies, having Iſſue Thomas his Son, and Griſſell his Daughter, Wife to the ſaid Thomas Baker; the ſaid Elizabeth by Parol in Pais moved her Eſtate in the ſaid Mannor of Hinton, and after this entred into the ſaid Mannor of Thoby, after which the ſaid Elizabeth died, and Thomas the Son, and Thomas the Uncle died alſo without Iſſue Male, after which the ſaid Leonard took one Mary to Wife, and died, having Iſſue Anthony Farners, after which the ſaid Mary took the ſaid John Butler to Husband, and after this the ſaid Anthony aſſigned to the ſaid Mary the ſaid Mannors of Thoby, in allowance for all her Dower, whereby the ſaid John Butler as in the Right of his Wife entred into the ſaid Mannor of Thoby, whereby the ſaid Thomas Delves by the Commandment of the ſaid Baker entred into the ſaid Cloſe, of which the Action is brought as in Right of the ſaid Griſell; and whether this Entry were lawful or not, was the Queſtion, which was argued in the Court, in the time of the late Lord Wray; and he, and Gawdy held ſtrongly that the Entry of the ſaid Delves was lawful, but Clench and Fennor held always the contrary, whereupon it was adjourned into the Exchequer Chamber.

But they all agreed, that the Waiver made by the ſaid Elizabeth by Parol in pais, was a ſufficient Waiver of her Eſtate in Hinton, and the rather, becauſe of the Statute of 27 H. 8. cap. 10. the words of which are; That if the Joynture be made after the Marriage, that then the Wife ſurviving her Huſband may after his death refuſe to take ſuch Joynture.

And now it was moved by Tanfield, that Judgment ought to be given for the Plaintiff, for by the Waiver of the Wife, the Inheritance of Hinton is now to be ſaid wholly in the Husband ab initio, and therefore that with Fobbing being a whole third part of the whole Land which now is to be ſaid to be left to deſcend to the Heir of the Deviſor, as to Thoby; is good for the whole, and if ſo then no part thereof deſcends to Griſell, and therefore the Entry of the ſaid Delves in her Right is wrongful.

Coke Attorney-general to the contrary, for he ſaid, That it is to no purpeſe to conſider what Eſtate the Deviſor had in the Mannor of Hinton, by reaſon of this Waiver made by his Wife, ex poſt facto, after his death. But we are to ſee what Eſtate the Deviſor had in it in the view of the Law, at the time of his death before the Waiver, and according to it the Law ſhall adjudge that he had power to make his Deviſe by means of the Statute; and at this time none can adjudge another Eſtate in him but joyntly with his Wife, of which Eſtate he had no power to make any Diſpoſition, or to deviſe it, or to leave it for the third part to his Heir, for the Statute which is an Explanatory

natory Law in this point) ſays, that he ought to be ſole ſeiſed in ſuch a Caſe. And further the Statute of 34 H. 8. at the end, is, that the Land which deſcends immediately from the Deviſor ſhall be taken for the third part, and this Land did not deſcend immediately, for it ſurvived to the Wife until ſhe waived it, and therefore this Land is not to be taken for any third part, which the Statute purpoſed to have been left to the Heir, and therefore ſo much ſhall be taken from Thoby as with Fobbin ſhall be a third part to deſcend, whereby Griſell the Heir hath good Right yet to part of Thoby, and therefore the Entry of the ſaid Delves in her Right by Commandment of her Husband not wrongful.

Periam Chief Baron, Clench, Clark, Walmſley and Fennor, That now by reaſon of the Waiver in the Deviſor ſhall be ſole ſeiſed ab initio, for the ſaid Elizabeth might have had Dower thereof, if ſhe would, as in the like Caſe it is adjudged in 17 E. 3. 6. and therefore a ſole Seiſin in the Husband, and the Deſcent to the Heir in ſuch a Caſe upon the Waiver, ſhall take away the Entry of him who hath Right to it. And therefore the Caſe now for the Mannor of Hinton is within the very letter of the Statute, as well for the ſole Seiſin which was in the Deviſor, as for the immediate Deſcent which was from the Deviſor to his Heir, and therefore remains to the Heir for a good third part of the Inheritance of the Deviſor, by the very Letter of the Statute, and if the Letter had not helped it, yet it ſhall be helped by the purport and intent of the Statute, which ought to be liberally and favourably conſtrued for the benefit of the Subject, who before the Statute of Uſes might have diſpoſed of his whole Land by reaſon of Uſes by his Will, and the Statute of 27 H. 8. excludes him thereof, and therefore the Statute of 32 & 34 H. 8. are to be liberally expounded as to the Subject for the two parts, and the rather becauſe it appeareth by the Preamble of the Statute of 32 H. 8. that it was made of the Liberality of the King, and becauſe that by 34 H. 8. it appeareth that it was made to the intent that the Subject ſhall take the advantage and benefit purpoſed by the King in the former Statute, by all which it appeareth (as they ſaid) that the ſaid Statutes ſhall be liberally expounded for the advantage of the Subject, and for his benefit, and not ſo ſtrictly upon the letter of the Law as hath bæn moved; and ſo they concluded that Judgment ought to be given for the Plaintiff.

Popham and Anderſon the two Chief Juſtices, and all the other Juſtices and Barons held the contrary, and that Judgment ought to be given againſt the Plaintiff; and that by the very letter and purport of the Statutes of 32 & 34 H. 8. for they ſaid, they are to conſider what Eſtate the Deviſor had in the Land at the time of this Deviſe made, without regard to that which might happen by matter Ex poſt facto upon the Deed of another: and if it had been demanded of any appriſed in the Law, at the time when the Will was made, what Eſtate the Deviſor then had in the Mannor of Hinton, none is ſo unlearned to ſay, that he had other Eſtate in it, then joyntly with his Wife: And if ſo, it follows that this Mannor was then out of the letter and intent of the Law, for he was not then ſole ſeiſed thereof, nor ſeiſed in Co-parcenary, nor in common, and by the words he ſhould be ſole ſeiſed in Fee-ſimple, or ſeiſed in Fee-ſimple in Co-parcenary, or in common: It appeareth that the intent of the Statute was, that he ſhall have full power of himſelf, without the means or aid of another, to diſpoſe of the Land, of which he is by the Statute to make diſpoſition, or to leave it to his Heir, and this he hath not for the Mannor of Hinton here.

And further, the words of 32 H. 8. are, That the Deviſor hath full power at his Will and pleaſure to deviſe two parts of his Land ſo holden as here, and this is to be intended of ſuch Land of which he then had full power to make Diſpoſition, and this he could not then do for the Mannor of Hinton.

And further the words of 34 H. 8. are that the Diviſion for the parts ſhall be made by the Deviſor or Owner of the Land by his laſt Will in writing, or otherwiſe in writing and in default thereof by Commiſſion, &c. And can any ſay with reaſon, that it was the intent of the Statute that he ſhall make the Diviſion of other Lands than of thoſe of which he then had full power to deviſe or to leave to his Heir without any future Accident to help him, or the mean of Anthony by matter Ex poſt facto; It is clear that Reaſon cannot maintain it. And the words following in the Act, which are, That the King ſhall take for his third part the Land which deſcended to the Heir of the Eſtate Tail, or of Fee-ſimple immediately after the death of the Deviſor, much enforce the Opinion on this ſide, for it cannot be ſaid upon the death before the Waiver that this Manor of Hinton was immediately deſcended, ergo, it ought not to be taken for the third part.

And further, the words are, If the Lands immediately deſcended upon the death of the Deviſor, &c. do not amount to a full third part, that then the King may take into his hands ſo much of the other Lands of the Deviſor as may make a full third part, &c. whereby it is clear, that in this Caſe if the Wife had not waived her Eſtate for ten years after the death of the Deviſor, that for all this time the Queen could not meddle with the Manor of Hinton, and therefore in the mean while ſhe might well have ſo much of the Manor of Thoby, which might well have made a full third part to her, and for ſo much which ſhe took the Will was always void, which ſhall never be altered nor made good by any Waiver Ex poſt facto. And although the Waiver of the Feme put the Inheritance entirely in the Deviſor, and in his Heirs, in relation to divers reſpects, yet as to other reſpects he ſhall not be ſaid in them with ſuch Relation, and eſpecially upon the Statute in which we now are to reſpect the Power as it was in him at the time of his death, before this future Contingent.

And by Popham, If the Expoſition on the other ſide ſhall hold place upon the Statute, perhaps a Man ſhall not ſee by the ſpace of ſix years, or more, after the death of a Deviſor, how his Deviſe ſhall work: As a Feoffment in Fee is made to I. S. and a Feme Covert, and their Heirs, of 10 l. Land holden by Knights Service in Capite, which I. S. hath 20 l. Land in Fee ſo holden alſo; I. S. makes a Deviſe of his 20 l. Land, the Husband lives 60 years after; none will or can deny but that for this time the Deviſe is not good for two parts, now the Husband dies, and the Wife waives the Eſtate made to her, this puts the Inheritance thereof in the Heir of I. S. with relation to divers reſpects, but not to this reſpect to make the Will now good for the whole 20 l. Land, which therefore was void by matter Ex poſt facto, after the death of the Deviſor, cannot be made good: And by him the Deſcent in ſuch a Caſe is not ſuch that it ſhall take away the Entry of him who hath Right, becauſe it was not an immediate Deſcent in Deed, but upon the Operation of Law which gave Wardſhip and the like, but not to prejudice any third Perſon.

And he ſaid, that although the Queen, or other Lord upon Eviction of the Land deſcended, or the Determination of the Eſtate thereof, may reſort to Lands deviſed or aſſured, and take a third part thereof, yet thereby the Deviſe or Aſſurance remains effectual againſt the Heir, but this is by a ſpecial Clauſe in the Statute of 34 H. 8. which gives it to them, but no ſuch Remedy is given to the Deviſee to help him if his part be abridged, or evicted: And the words are preciſe, to wit, If the part left or aſſigned to the King, or to any Lord, at any time during their Intereſt therein be evicted, &c. that they ſhall have ſo much of the two parts reſidue, as ſhall make a full third part of the Remainder not evicted, &c. Whereby it appeareth, that this is given only for the benefit of the Lords, and not of the Heir, nor of the Deviſee; for if after the Intereſt of the Queen, or other Lord be determined, this which was left

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be evicted from the Heir, it ſhall not be helped againſt the Deviſe, but the Deviſe remains good to the Deviſee againſt the Heir for the whole Land deviſed, whereby it appeareth, that it was the very purport and intent of the Statute, that the Deviſe remain as it was at the time of the death of the Deviſor, without having regard to that which happeneth Ex poſt facto, unleſs for this Point helped by this ſpecial Clauſe of the Statute; and this is for the Lord and his Intereſt only, and for no other: And by him alſo clearly the Statute which is an explanatory Law ſhall never be taken by Equity in the preciſe Point explained to impugn the Point of Explanation, as here the Statute wills that the Eſtate of Inheritance comprized in the former Statute, ſhall be explained to be Fee-ſimple, it cannot now by any Equity be, as to the Power to make a Deviſe which is meerly given by the Authority of the Statute, ſaid to be of any other Eſtate than Fee-ſimple, of which a Deviſe may be made: And therefore if Land be given to another and his Heirs for the term of another Man's life, a Deviſe cannot be made of this, becauſe it is not an Inheritance in Fee-ſimple, but only the Limitation of a Free-hold: And where the Statute ſaith, having a ſole Eſtate, we cannot by any Equity, that it ſhall be taken of any joynt Eſtate, as to make any diſpoſition of that which ſhe had in Joynture, and thereupon the greater part reſolved that Judgment ſhall be given againſt the Plaintiff for the Defendants.

Southwell *verſus* Ward.

4. IN a ſecond Deliverance between Richard Southwell Eſquire, Plaintiff, and Miles Ward Avowant, by Demurrer upon the Avowry, the Caſe appeared to be this.

That John, Prior of the Church of St. Faiths in Horſham in the County of Norfolk, was ſeiſed in his Demeſn as of Fee, in the Right of his ſaid Priory, of 8 Meſſuages, 300 Acres of Land, 30 Acres of Meadow, 60 Acres of Paſture, and 200 Acres of Wood, with their Appurtenances in Horſham aforeſaid: And ſo ſeiſed, the ſaid Prior with the Aſſent of his Covent, by their Deed indented, ſhewn forth, bearing Date the firſt day of January, 13 E. 4. and by Licence of the King aforeſaid, granted to William then the Maſter of the Hoſpital of St. Giles in Norwich, and to the Brothers of the ſame Hoſpital, and to their Succeſſors 200 Fagots, and 200 Focalls called Aſſle-wood, yearly to be taken of all the Lands and Tenements of the ſaid Prior and Covent in Horſham aforeſaid, by the Servants of the ſaid Prior and Covent, and their Succeſſors yearly to be carried to the ſaid Hoſpital, at the Coſts and Expences of the ſaid Prior and Covent, and their Succeſſors, at the Feaſt of St. Michael, or 20 s. of lawful Money for them at the Election of the ſaid Maſter and Brethren, and their Succeſſors, to take yearly in the ſame Lands and Tenements in Horſham, to the uſe of the poor and infirm Perſons there being or coming: So that if it happen the ſaid Fagots and Focalls, or the ſaid 20 s. for them to the ſaid Maſter and Freres in form aforeſaid, to be arrear in all or part, &c. then they may diſtrain in the ſaid Lands and Tenements, and the Diſtreſs detain until they be fully ſatisfied of the ſaid Fagots and Focals, or of the ſaid 20 s. for them as is aforeſaid, with this Proviſo further, That if at any one or more times, the ſaid Maſter and Brethren have choſen to have the Fagots and Focals, yet at any other time they make the 20 s. for them, and although they have taken the 20 s. for them once, or oftner, yet at any other time they may take the Fagots and Focals themſelves, and that they may ſo vary toties quoties, and diſtrain for them accordingly, reaſonable notice being given of their Election, in form aforeſaid.

And the ſaid Maſter and Brethren granted by the ſame Deed to the ſaid Prior and Covent, and their Succeſſors, that they, or others ſufficiently warranted by them, would give ſufficient notice of their Election yearly, the firſt Sunday of April in the Church of the ſaid Hoſpital, to ſome Officer of the ſaid Prior and Covent, and their Succeſſors, if they ſend any thither for this cauſe.

By force of which Grant the ſaid Maſter and Brethren were ſeiſed of the ſaid yearly Rent of the ſaid 200 Fagots and 200 Focals called Aſtle-wood accordingly, and ſo being ſeiſed, they by their ſufficient Writing enrolled of Record in the Chancery, in the firſt year of the late King E. 6. gave and granted to the ſame King the ſaid Hoſpital, and all the Lands and Tenements and Hereditaments of the ſaid Hoſpital; To have and to hold, to him and his Heirs and Succeſſors for ever, whereby the ſaid King was thereof, and of the ſaid Annual Rent ſeiſed accordingly, and ſo ſeiſed the 7th day of May, in the ſame year, the ſaid King E. by his Letters Patents, bearing date the ſame day and year, granted the ſaid Hoſpital and the Rent of the ſaid Fagots and Focals, and other the Premiſes, to the Mayor, Sheriff, Citizens and Commons of the City of Norwich, and to their Succeſſors for ever; and for 1600 Fagots and 1600 Focals of the ſaid Annual Rent of 200 Fagots and 200 Focals, being arrear at the Feaſt of S. Michael the Arch-angel, 23 Eliz. the ſaid Ward took the Diſtrels, and made Conuſance as Bailiff to the ſaid Mayor, Sheriff, &c. And it was moved that the Avowry was not good, firſt, becauſe it being matter of Election which was granted to the Maſter and Brethren, and their Succeſſors, to wit, the Fuel, or the 20 s. it doth not appear that they ever made any Election of the one, or the other, and until it appeareth that they have made their Election to have the one or the other, it is not to be granted over by general words: But by the Diſſolution of the Hoſpital, the Grant, for want of Election before is gone and determined.

And further, whereas the King made his Grant of the Hoſpital, and of all the ſaid Rent of Fagots and Focals, without making mention of 20 s. for the ſame, it was moved that if it doth paſs to the King, yet it doth not paſs from him to the Mayor, &c. in as much as he granted it preciſely as a Fuel, whereas it was in him as a Rent of Fuel, or of Money at his Election, and therefore the King deceived in his Grant.

And further, here he hath made Conuſance for the Fuel without making mention of their Election, to have it one way, or another, before the taking; but all the Court agreed that the Conuſance was good, and that the Return ſhall be awarded to him who made the Conuſance: firſt, becauſe that this Caſe is quite out of the Caſe of Election, becauſe the Rent which is granted is only out of the Fagots and Aſtle-wood, and the 20 s. granted is not as a diſtinct thing, but granted as a Recompence or ſatisfaction of that, becauſe the Grant is of the Fagots, &c. or of 20 s. for the ſame; ſo that in ſuch a Caſe the Seiſin of the 20 s. is a good Seiſin of the Fagots and Focals, and ſufficeth to maintain an Aſſiſe upon this Seiſin for the Fuel, but not for the 20 s. as Money paid for Suit of Court is good Seiſin of the Suit: And the 20 s. here is not granted in nature of a Rent of ſo much, but as an Allowance in ſatisfaction for the Fuel.

And Popham conceived that he ſhall have an Action of Debt for this 20 s. for the Fuel, after the Election made, if he will, as for a Nomine pœnæ, becauſe it is not the principal thing granted of which the Inheritance is, but a caſual Accident in recompence thereof if he will have it, or otherwiſe he may diſtrain for it, becauſe it is ſo limited to be done by the Grant it ſelf: But they ſhall never have aſſurance of the 20 s. as a thing of Inheritance, becauſe it is not the thing of which the Inheritance is granted, but only granted in allowance and ſatisfaction of it, and therefore not to be reſembled to the Caſes where 20 Quarters of Corn, or 20 s. Rent is granted to one

one and his Heirs, or other ſuch thing which ſtands meerly in the Diſjunctive, to wit, to have, or take the one or the other.

And therefore ſuppoſe the Prior was to carry the Fuel yearly to the Hoſpital at the Feaſt of S. Michael, and yet then the Maſter and Brethren might have refuſed the Fuel, and held themſelves to have the 20s. by force of the Grant, for then Originally the Election ought to have been made there: But upon the Covenant which cometh afterwards on the other part, the notice ought to have been given in April yearly before, but if it be not done, there lies but an Action of Covenant for the not doing of it, for this will not alter the nature of the Grant which was full and perfect in Law before. And here he needs not make this appearance in the Conuſance, that any Election was made before the taking of the Cattel, becauſe the Grant is of the Fuel it ſelf, and if the other had made Election before to have the 20s. for the Fuel, this ought to have been ſhewn on the other ſide in Bar of the Avowry, to wit, that he brought to them the Fuel yearly according to the Grant, and that they refuſed it, and required the 20s. every time for it, in which Caſe for every ſuch Refuſal and Election to have the 20s. for it, it had excluded him to have any Fuel for this year ſo refuſed.

And by Popham alſo, you may ſee a great diverſity betwéen this Caſe, where a Man is to deliver to another 20 Loads of Wood, or 20 Loads of Hay yearly out of ſuch Land, and he does not tender them for divers years, and where a Man is to take ſo much Fuel, or Hay out of the Land of another, and he takes it not for divers years, for in the former Caſe the Party who is not ſatisfied ſhall have all the Arrears, be it never ſo prejudicial to the Grantor, becauſe it was through his own default that it was not paid, but in the other Caſe as appeareth, 27 H. 6. 10. he ſhall not have any Remedy for the Arrears for the years paſt, becauſe he took them not yearly as they were due, which ſhall not turn the other Party to prejudice, that he ſhall want Fuel, or Hay himſelf, by reaſon of the Arrears which happened through the default of him who ought to take it, and the Judgment was given for him who made the Conuſance, and it is entred in the King's Bench, Mich. 33 & 34 Eliz. Rot. 229.

Southwell's *Caſe*.

5. AT the end of this Term, upon the proceeding againſt Southwell the Jeſuit, it was moved by the Attorney-general to Popham Chief Juſtice, the Maſter of the Rolls, Periam Chief Baron, Walmſley and Owen Juſtices, and Ewens one of the Barons of the Exchequer upon the form of Indictments, upon the Statute of 27 Eliz. for Jeſuits, &c. If it need be comprehended in the Indictment of a Jeſuit, who cometh into the Realm of England, or any Dominions of the Quéen, or ſhall be taken therein 40 days after the end of this Seſſion of Parliament, that if he doth not ſubmit himſelf within three days of his landing, if he cometh in after the 40 days according to the Proviſo of the Statute, or that he was not ſo infirm of his Body (where he came in before the 40 days) that he was not able to paſs out of the Realm by the time preſcribed at firſt, becauſe that it is compriſed in the Body of the Act, that it ſhall not be lawful for any Jeſuit, &c. being born within this Realm, or any other the Quéens Dominions, and made after the Feaſt of S. John Baptiſt, in the firſt year of her Reign, or after this to be made by any Authority derived, &c. from the See of Rome to come, be, or remain in any part of this Realm, &c. otherwiſe than in ſuch ſpecial Caſes, and upon ſuch ſpecial occaſions, and for ſuch time only which is expreſſed in this Act, and if he does, that this Offence ſhall be adjudged High Treaſon, &c.

And

And after Deliberation taken, and Conſideration and Conference amongſt themſelves had, they all reſolved that the better courſe was to omit this in the Indictment, notwithſtanding it be compriſed in the Body of the Act in the ſame manner as if it had been only in a Proviſo; in which Caſe it is to the Priſoner to help him by means of ſuch a Proviſo, if he can do it: for the words (other than, &c.) are but as referring to the Proviſion ſubſequent in the Statute, in which Caſe this matter ſhall be uſed but as the Proviſo it ſelf ſhall be; and according to this it hath been commonly put in practice by all the Juſtices in all places after the Statute until now.

And they agreed alſo, that it need not be ſhewn whether he were made a Jeſuit, or Prieſt, &c. either beyond Sea, or within the Realm, becauſe whereſoever it was, it is within the Law if he were made by the pretended Authority of the See of Rome.

But they agreed that it ought to be compriſed in the Indictment that he was born within this Realm, or other Dominions of the Queen, but need not to ſhew where, but generally, Et quod J. S. natus infra hoc Regnum Angliæ, &c. And the Indictment ought to compriſe that he was a Jeſuit, or Prieſt, &c. by Authority challenged or pretended from the See of Rome, becauſe that this is in the Body of the Act, without ſuch Reference as in the other Point, and according to this Reſolution the Proceeding was againſt the ſaid Southwell.

Eaſter Term, 37 Eliz.

Pigot's *Caſe.*

1. AFter the death of Valentine Pigot Eſquire, a Commiſſion was awarded in nature of a Mandamus, and after the death of Thomas Pigot Father of the ſaid Valentine, a Commiſſion was awarded in nature of a Diem clauſit extremum, and the ſaid Commiſſions were awarded to one and the ſame Commiſſioners, who by one Inqueſt took but one Inquiſition upon theſe ſeveral Commiſſions in this Form.

Inquiſitio indentata capta apud, &c. virtute Commiſſ. in natura brevis de Diem clauſit extremum eiſdem Commiſſ. direct. &c. ad inquirendum poſt mortem Thomæ Pigot, Ar. nuper defuncti patris prædict. Valentin. per ſacramentum, &c. Qui dicunt, &c. After which all the Points of the Commiſſion after the death of the ſaid Valentine are enquired of; but for the Commiſſions after the death of the ſaid Thomas Pigot, it is imperfect in ſome Points, as who is his Heir, &c. is not found.

And by Popham and Anderſon, this Inquiſition is void as to Valentine as well as for Thomas, for their Authorities which are the Commiſſions are by ſeveral Warrants which cannot be ſimul & ſemel by one and the ſame Inquiſition executed and ſatisfied, but ought to be divided and ſeveral, as the Warrant is ſeveral, and yet the ſame Inqueſt which found one Inquiſition by one Warrant, may alſo find another Inquiſition by another Warrant, but divided and ſeveral, and not as one, for as it is made it does not appear upon which of the Commiſſions the Inquiſition as to Valentine is taken, for as it is made it may be as well upon the one as upon the other, for it is ſaid to be by virtue of both the Commiſſions, which cannot be, and therefore is not good in any part, and ſeveral Warrants ought to be ſeverally executed, and therefore although the Eſcheator, as appeareth by 9 H. 7. 8. may take an Inquiſition Virtue officii, and at the ſame day another Inquiſition Virtue brevis by one and the ſame Inqueſt, yet this cannot be drawn into one Inquiſition:

And

And that which is found Virtute officii contrary to that which before the ſame day Virtute brevis, as that it found more Land, is good for the King. And this their Opinion was certified to the Court of Wards.

Sir Rowland Hayward's *Caſe.*

2. THis Caſe was alſo ſent to the ſame Chief Juſtices out of the Court of Wards: Sir Rowland Hayward being ſeiſed in his Demeſn as of Fée, of the Mannors of D. and A. in the County of Salop, and of other Lands in the ſame County, part whereof were in Leaſe for years by ſeveral Indentures, rendring certain Rent, part in the Poſſeſſions of ſeveral Copy-holders, and part in Demeſn in Poſſeſſion out of Leaſe, by Indenture dated 2 September, 34 Eliz. made mention that this was for, and in conſideration of a certain ſum of Money to him paid by Richard Warren Eſquire, and others, demiſed, granted, bargained and ſold to the ſaid Richard Warren and the others, the ſaid Mannors, Lands and Tenements, and the Reverſion and Remainder of them, and of every part of them, and the Rents and Profits reſerved upon any Demiſe thereupon for 17 years, next enſuing the death of the ſaid Sir Rowland, rendring a Roſe at the Feaſt of S. John Baptiſt yearly, if it be demanded, which Deed was acknowledged to be enrolled, and afterwards by another Indenture covenanted and granted for him and his Heirs, hereafter to ſtand ſeiſed of the ſaid Mannors, Lands and Tenements, to the uſe of the ſaid Sir Rowland, and of the Heirs Males of his Body, and afterwards and before any Attornment to the ſaid Richard Warren and his Co-leſſees, or any of them, the ſaid Sir Rowland died ſeiſed of the ſaid Mannors, Lands and Tenements, leaving a full third part of other Lands to deſcend to his Heir. See this Caſe in *Coke* 2. Report 35.

And it was moved on the Queens part, that for part, to wit, for that which was in Poſſeſſion it paſt to the ſaid Richard Warren, and the other by way of Demiſe at Common Law, and therefore it doth not paſs afterwards by way of Bargain and Sale as to the Remainder, and that therefore for the Services of the Mannors, and for the Rents reſerved upon the Demiſe, theſe remain to the Heir who was in Ward to the Queen, and within Age, and therefore to the Queen by reaſon of the Tenure which was in Capite by Knights Service.

But by Popham and Anderſon it is at the Election of the ſaid Richard Warren and his Co-leſſees to take it by way of Demiſe, or by way of Bargain and Sale, until that by ſome Act done, or other matter, it may appear that their intent is to take it another way, for the Uſe in this Caſe may well paſs without the Inrolment of the Deed, becauſe the Statute of 27 H. 8. of Inrolments extends but to where a Free-hold is to paſs, and the Uſe ſo paſſing, this ſhall be executed by the Statute of 27 H. 8. of Uſes, and therefore if the ſaid Richard Warren and his Co-leſſees after the death of the ſaid Sir Rowland Hayward, would elect to take it by way of Bargain and Sale, they ſhall have all the Reverſions, Remainders, Rents and Services, as well as the Land in Poſſeſſion executed to them by the Statute of Uſes: And of the ſame Opinion were all the Juſtices in Trinity Term following, upon their meeting at Serjeants Inn for another great cauſe.

Trinity

Trinity Term, 37 Eliz.

where a Juſtice of Peace bails one who is not bailable, he ſhall be fined, and albeit he be committed but for Suſpition of Felony, and hath no notice of his Offence.

1. UPon an Aſſembly of all the Juſtices and Barons of the Exchequer at Serjeants Inn in Fleet-ſtreet, this Term it was reſolved by them, and ſo agréed to be hereafter put in Execution in all Circuits; That if a Man taken for Felony be examined by a Juſtice of Peace, it appeareth that the Felon is not Bailable by the Law, and yet the Juſtices commit him to Goal but as upon Suſpition of Felony, not making mention for any Cauſe for which he is not Bailable, whereby he is brought before another Juſtice of Peace, not knowing of any matter why he ought not to be bailed, whereupon they bail him, theſe Juſtices ought to be fined by the Statute of 1 & 2 Phil. & Mar. for they offend if they bail him, who by the Statute of Weſtm. 1. is not Bailable, and therefore they at their peril ought ſo to inform themſelves before the Bail taken of the matter, that they may be well ſatisfied that ſuch an one is Bailable by Law; and therefore obſerve well the Statute of Weſtm. 1. cap. 18. who is Bailable, and who not by the Law. And it ſeems that no Juſtice of Peace could have bailed any one for Felony before the Statute of 1 Rich. 3. cap. 3. which is made void by 3 H. 7. cap. 3. for before this he ought to have been bailed by the Sheriff, or other Keeper of the Priſon where he was in Ward, or by the Conſtable, and by no other Officer, unleſs Juſtices of the King's Bench, Juſtices in Eyre, or Juſtices of Goal-delivery.

Herbin *verſus* Chard, *and others.*

2. IN Treſpaſs by William Herbin Plaintiff, againſt Chard and others Defendants, for a Treſpaſs made at Pynon Farm in Netherbury and Loder, in the County of Dorſet, the Caſe upon the Demurrer appeared to be this.

The Lord Mordant was ſeiſed of the Farm, in his Demeſn as of Fee, and ſo ſeiſed, demiſed it to Philip Fernam, Elizabeth his Wife, and John Fernam the eldeſt Son of the ſaid Philip, for term of their lives, and of the Survivor of them, and the ſaid Elizabeth died, after which the ſaid Philip his Father demiſed his part of the Farm by his Deed indented, dated 13 Mart. 32 Eliz. to Philip his Son, and Toby Fernam his Son, for eighty years, immediately after the death of the ſaid Philip the Father, if the ſaid John Fernam ſhall ſo long live, with divers Remainders over for years, depending upon the life of the ſaid John, after which the ſaid Philip the Father died, and John ſurvived him, and demiſed the ſaid Farm to the Plaintiff, upon whom the Defendants entred in Right of the ſaid Philip and Toby, and whether their Entry were congeable, was the Queſtion: And it was moved by Goodridge of the Middle Temple, that the Entry of the Defendant was not lawful, becauſe the ſaid John was now in by the Leſſor, and not by his joynt Companion.

And further, he had no power to diſpoſe thereof beyond his own life; for ſuppoſe that he makes a Leaſe thereof for years, and afterwards grant over his Eſtate to a Stranger, and dies, the Leaſe for years is thereby determined, albeit his joynt Companion be yet living, and that his Eſtate continues.

And yet he agréed, that if he had made a Leaſe for years, to begin at a day to come, as at Michaelmas following, or the like, that this had been good, for it is an Intereſt in the Grantee to be granted over for the Preſumption, that it might be executed in his life; but in the other Caſe there is not any poſſibility, that he who hath not but for his life, can demiſe it to begin after the Eſtate made to him is determined.

But

But on the other part, it was moved that the Demiſe remains in force for the life of the ſaid John, for at the firſt every one had an Intereſt for the life of the other alſo, and therefore if one Joynt-tenant for life make a Leaſe for years in Poſſeſſion, and dies, the Leaſe yet continues. Poſtea P. 148. Blaxton v Heath

And Crook the younger alledged, that it was adjudged at laſt Hartf. Term, If a Man poſſeſſed of a Term for years in Right of his Wife, makes a Leaſe for years of the ſame Lands to begin after his death, and dies during the Term, without other alteration of it, and the Wife ſurvives him, that now the Leaſe made by the Husband is good, and that the like Caſe as this, by the Opinion of Glench and Walmſley was decreed to be good in the Chancery.

Arton *verſus* Hare.

3. IN a ſecond Deliverance between Francis Arton Plaintiff, and Henry Hare Avowant, the Caſe appeared to be this.

William Cockſey Eſquire was ſeiſed in his Demeſn as of Fee, of the Mannor of Wolverton in the County of Worceſter, and ſo ſeiſed in Octab. Pich. 7 Eliz. levied a Fine of the ſaid Mannor to certain Perſons, to the uſe of the ſaid William and Alice his Wife, and the Heirs of William, until a Marriage had between Partin Croft and Anne Wigſtone, and after this Marriage to the uſe of the ſaid William and Alice his Wife, and the Heirs of the Body of the ſaid William, and for default of ſuch Iſſue, to the uſe of the ſaid Partin Crofts and Anne, and the Heirs Males of the Body of the ſaid Partin upon the Body of the ſaid Anne begotten, until the ſaid Partin ſhould go about to alien, ſell, grant, or give the ſaid Mannor, or any parcel thereof, or to ſuffer any Recovery, or levy any Fine thereof, or make any Diſcontinuance, &c. And after the Eſtate of the ſaid Partin and Anne, and of the Heirs Males of their Bodies to the Premiſſes, by any ſuch Attempts determined and finiſhed, then to the uſe of the ſaid Anne for her life, and after to the uſe of the Heirs Males of the Body of the ſaid Partin upon the Body of the ſaid Anne lawfully begotten, and for default of ſuch Iſſue to the uſe of the Heirs of the Body of the ſaid Partin, and for default of ſuch Iſſue, to the uſe of Giles Croft, Brother of the ſaid Partin, and the Heirs Males of his Body, until, &c. as before, and after to the uſe of the Heirs of the Body of the ſaid Giles, and for default of ſuch Iſſue, to the uſe of Edmund Crofts, the third Brother of the ſaid Partin, and of the Heirs Males of his Body, as is before limited to the ſaid Giles, with Remainders over, afterwards the Marriage was had between the ſaid Partin and Alice, after which the ſaid Partin and Giles died without Iſſue, without any thing done by the ſaid Partin to determine his Eſtate, or by the ſaid Giles to determine his Eſtate, if any had been.

And it was agreed by all the Court, that as this Caſe is, no Remainder can enure over to the ſaid Giles, without an Attempt precedent by the ſaid Martin to determine his Eſtate, becauſe the Eſtate of Giles is not limited to begin but upon ſuch an Attempt precedent.

And in the ſame manner Edmund ſhall have nothing until the Eſtate of Giles determine by ſome Attempt made by him, if the ſaid Giles had an Eſtate, becauſe the Eſtate of Edmund depends upon the Attempt made by Giles precedent to it, which not being done, the Eſtate of Edmund never happened to be; and therefore he who cometh in under a Diſcontinuance made by the ſaid William Cockſey, after the death of Martin and Giles without Iſſue notwithſtanding the Remitter of the ſaid Alice in the Caſe, is to have the Land againſt thoſe who come in by the ſaid Edmund, and upon this Point only Judgment was given accordingly in the King's Bench.

Grenningham *verſus the Executors of* Heydon.

4. IN Debt upon an Obligation of 200 Marks by Richard Grenningham Plaintiff, againſt the Executors of one Ralph Heydon Defendants, the Caſe appeared to be thus upon Demurrer.

The ſaid Heydon was bound to the Plaintiff in 200 Marks, the Condition whereof recites, that whereas the ſaid Heydon had received of the ſaid Grenningham 70 l. 6 s. 8 d. before the date of the ſaid Obligation of 200 Marks in payment and ſatisfaction of certain Obligations and Bills of Debt, remaining in the hands of the ſaid Heydon, and ſpecified in the Condition what they were in certain, and the which ſaid Bills and Obligations the ſaid Heydon is to deliver, or cauſe to be delivered to the ſaid Grenningham, his Heirs or Aſſigns, before the Feaſt of S. Michael, next enſuing the date of the ſaid Obligation, or otherwiſe the ſaid Heydon, his Executors, Adminiſtrators or Aſſigns, or ſome of them before the ſame Feaſt, ſhall make, or cauſe to be made and delivered to the ſaid Plaintiff, his Heirs and Aſſigns, ſuch good and ſufficient Acquittances for the payment of the ſaid ſums of Money formerly mentioned, as the ſaid Plaintiff, his Heirs, Executors or Aſſigns ſhall deviſe, or cauſe to be deviſed by the Council of the ſaid Plaintiff, his Heirs or Aſſigns, before the Feaſt, without fraud or deceit, that then the ſaid Obligation ſhall be void, &c.

And before the Feaſt the ſaid Plaintiff did not deviſe any Acquittance; Whether now the Obligation be ſaved by the Diſjunctive, without delivering the Obligations and Bills before named, before the Feaſt of S. Michael: Rot. 36. & 37.

Eton *and* Monney *verſus* Laughter.

See this Caſe *Coke lib.* 5. 21. by the name of *Laughter's* Caſe.

5. IN Debt upon an Obligation of 400 l. by Thomas Eton and Roger Monney Plaintiffs, againſt Thomas Laughter Defendant, who was bound together with one Richard Rainford to the ſaid Plaintiffs, the Condition of which Obligation was,

That if the ſaid Richard Rainford after Marriage had between him and Jane Gilman Widow, together with the ſaid Jane, alienate in Fee, or Fee-tail all that great Meſſuage of the ſaid Jane in London, in the Tenure of William Fitz-Williams Eſquire, if then the ſaid Richard Rainford in his life time purchaſe to the ſaid Jane, her Heirs and Aſſigns, Lands and Tenements of good Right and Title, and of as good value as the Money raiſed upon the Alienation of the ſaid Meſſuage amounts unto, or leave to the ſaid Jane after his deceaſe, as Executrix, or by Legacy, or other good Aſſurance, ſo much Money as he ſhall receive or have upon the ſaid Sale, that then the Obligation ſhall be void: After which the ſaid Richard Rainford married with the ſaid Jane, and the ſaid Richard and Jane ſold the ſaid Meſſuage in Fee by Fine, for 320 l. received by the ſaid Richard Rainford, after which the ſaid Jane died, no Lands being purchaſed to the ſaid Jane by the ſaid Richard, and the ſaid Richard yet living.

Michaelmas Term, 37 & 38 Eliz.

Sawyer *verſus* Hardy.

1. IN an Ejectione firmæ, by Chriſtopher Sawyer **Plaintiff**, againſt Edmund Hardy **Defendant**, for a **Meſſuage in S. Martins**, upon a **Demurrer**, **the Caſe was this.**

A Leaſe was made of the ſaid Meſſuage to one **Margaret Sawyer** for 40 years, upon Condition, that if the ſaid **Margaret** ſhould ſo long continue a Widow, ſhe ſhould dwell and ſtay in the ſame Meſſuage, the ſaid **Margaret** continued a Widow, and dwelt in the ſame Houſe all her life, and died during the ſaid Term of 40 years, making the Plaintiff her Executor, and by Award the Plaintiff had Judgment to recover: **For by** Popham, Gawdy **and** Clench, **this now was no Condition nor Limitation, for it hath no certain Concluſion upon the** (that if) to wit, **that then the Term ſhall continue, or that ſhe ſhall pay ſo much, or otherwiſe what the Concluſion ſhall be, none can imagine: As if ſuch a Leaſe be made upon condition, that if the Leſſee does ſuch a thing without other Concluſion, it is a good Leaſe for 40 years, for none can imagine what the Concluſion ſhall be in ſuch a Caſe, or that then the Leaſe ſhall be void, or that he ſhall re-enter, or that the Leſſee ſhall forfeit ſo much, or what ſhall happen upon it, for which Incertainty it ſhall be taken as a void Clauſe.**

But by Popham, **if it had been** Sub conditione ſi tamdiu vixerit, **it had been good to determine the Leaſe, but it is otherwiſe of the word** (quod ſi) **for the Incertainty as before.**

And they all agreed, that if the Leaſe had been for 40 years, Si tamdiu ſola viveret & inhabitaret in eodem Meſſuagio, **that the Leaſe had been determined by her Marriage, or death. In the ſame manner, as if it had been** Si tamdiu vixerit. **And ſo in truth had been the Caſe if it had been well pleaded, but by pleading the advantage thereof was loſt, and the truth not diſcloſed.**

But by Popham, If a Leaſe be made for 40 years, if he ſhall dwell in the ſame for his life, there it is good for 40 years, upon performance of the Condition, the diverſity appeareth, **to wit,** where it is, if he ſhall dwell there during the Term, and where it is, if he ſhall inhabit there during his life.

Goodale *verſus* Wyat.

2. IN an Ejectione firmæ **by** Cuthbert Goodale **Plaintiff, againſt** John Wyat **Defendant, for a Meadow in** Aylesbury, **in the County of** Buck. **called** Diggelmore, **upon a ſpecial Verdict the Caſe was this.**

See this Caſe *Coke lib.* 5. *fol.* 95, 96. by the name of *Goodale's* Caſe.

Sir **John Packington** Knight, enfeoffed thereof one **Ralph Wodliff**, to have and to hold to him and his Heirs, upon condition that if the ſaid Sir **John** within a year after the death of the ſaid **Ralph**, pay to the Heirs, Executors or Adminiſtrators of the ſaid **Ralph**, the ſum of an hundred Marks of lawful Money, that then the ſaid Feoffment and Seiſin made thereupon ſhall be void. **Ralph Wodliff** made a Feoffment over to others thereof, and died inteſtate, and Adminiſtration was committed to **Anne** his Wife, and **Drew Wodliff** his Son and Heir, who gave a Warrant of Attorney to **Thomas Goodale** then ſeiſed of the ſaid Meadow by mean Conveyances, for the Receipt of the ſaid hundred Marks, with Covenant that none of them ſhall do any act or thing that ſhall be prejudicial or hurtful to the ſaid **Thomas Goodale**, for the receiving and enjoying of the ſaid ſum, after which it was certified to the ſaid Sir **John Packington** by the ſaid **Goodale**

that this Warrant was made to him: after which it was agreed between the ſaid Sir John Packington and Drew Wodliff, that the ſaid Thomas Drew ſhall have but 32 l. of the ſaid 100 Marks, whereupon the ſaid Sir John Packington within a year after the death of the ſaid Ralph Wodliff paid to the ſaid Drew Wodliff the 100 Marks, and preſently the ſaid Drew delivered to the ſaid Sir John all the 100 Marks but 32 l. And the Verdict ſtands upon this Point, whether the 100 Marks were well paid, or not.

And by Popham and Gawdy, this was meerly a Fraud which ſhall never prejudice a third Perſon, for if it be agreed between the Diſſeiſee and I. S. that a Stranger ſhall diſſeiſe the Tenant of the Land, and enfeoff the ſaid I. S. to the intent that the Diſſeiſee ſhall recover againſt him, this Recovery ſhall bind the ſaid I. S. but not him who was diſſeiſed, and yet he who recovered had a good Title, and paramount the other, but he ſhall not come to that to which he had a good cauſe of Action and Title by fraudulent means, to the prejudice of a third Perſon, not Party to this Fraud.

And it was ſaid further, that to pay Money, and take it away again preſently before that it is purſed up by Re-delivery, is not properly a Payment, but rather a colour of Payment.

And by Fennor and Popham, the force of a Deed of Feoffment once effectual, cannot become void or of no effect, nor the Livery thereupon by ſuch manner of words. And it is not like a Bargain of Goods, or an Obligation, or a Leaſe for years, which by ſuch words may be diſſolved and made to be of no force or effect, becauſe that as by the ſealing a bare Contract, it may be made perfect and effectual without other Circumſtances, ſo may it be defeated by ſuch bare means without Circumſtance: But ſo it is not in caſe of an Inheritance or Free-hold, which cannot be effectual by the bare delivery of a Deed, unleſs that Livery be made thereupon.

And all agreed, that as this Caſe is, notwithſtanding the Feoffment made over by the Father, the Money might have been paid to the Heir to perform the Condition, if they had been duly paid, and without Covin, and that the words had been apt to have defeated the Eſtate.

In which Caſe a Conditon ſhall be performed to the Aſſignee, and not to the Heir.

But by Popham and Clench, If a Feoffment be made to one upon condition of Payment of Money to the Feoffee, his Heirs or Aſſigns, and the Feoffee makes a Feoffment over, and dies, the Money ought to be paid to the Feoffee who is the Aſſignee, and not to the Heir, for there (Heir) is not named but in reſpect of the Inheritance which might be in him, but here he is named as a meer Stranger to it.

Barton's *Caſe*.

3. IN a Writ of Error ſued in the King's Bench by Randal Barton, upon a Fine levied at Lancaſter, 7 Eliz. of Land in Smithall, and elſewhere in the County of Lancaſter, by Robert Barton Eſquire, to Leven and Browndo, where this Writ was brought by the ſaid Randal as Heir in full to the ſaid Robert, to wit, Son of Ralph, Brother of the ſaid Robert. The Defendant plead a Recovery in Bar thereof had after the Fine, in which the ſaid Robert was vouched, who vouched over the common Vouchee: And by all the Court this common Recovery with ſuch double Voucher (which is the common Aſſurance of Lands) is a Bar by reaſon of the Voucher, to every manner of Right which the Vouchee, or his Heir by means of him is to have to this Land, which is paramount the Recovery. And ſo it is of every manner of way whereby they are otherwiſe to come to the Land before the Recovery. And if the Recovery be erroneous, it remains a good Bar until it be avoided by Error. But if the Recovery be void, or the Voucher not warranted to be

be, purſuing the Appearance of the Tenant, but precedent to it, as was pretended, and ſo no Tenant to warrant the Voucher when the Voucher was made, the Recovery ſhall be no Bar in ſuch a Caſe; and the Caſe here was informed to be this, for the Writ of Entry bears date 1 Mar. 7 Eliz. returnable Die Lunæ in 4. ſeptimana quadrageſſimæ prox. futur. and the Voucher was made in 4. ſeptimana quadrageſſimæ, 7 Eliz. the ſaid firſt day of March, being the firſt Week of this Lent, 7 Eliz. And upon this it was inferred that the Tenant was not to appear until Monday in the fourth Week of Lent, 8 Eliz. which is a long time after that the Voucher appealed and vouched over.

But by the whole Court the Original Writ ſhall be taken as it is written, to be returnable on Monday, in the fourth Week of the ſame Lent, 7 Eliz. for it ſhall be taken as it is written ſhortly, moſt beneficially that it can be to make the Recovery good. And if it had been written Proxime, it ſhould refer to the week before, and ſo good. And if the word (Futur.) had been written at large (Futura) it alſo ſhall refer to Septimana, and therefore being written briefly it ſhall refer as it may beſt do to make the Recovery good. But if it had been in Quarta ſeptimata proximæ quadrageſſimæ at large, then the word Proximæ ſhall refer to Quadrageſſimæ becauſe of the Caſe: But if it had been Proxima it ſhall refer to Septimana, becauſe alſo of the Caſe; But here as the Caſe is, it ſhall be a good Reference to make the words Tunc proxima futur. to ſhew what fourth week of Lent, to wit, that next enſuing the firſt day of March. As if a Man be bound by Obligation, bearing date the firſt day of March, to pay the 10th day of March then next enſuing, this ſhall be taken the 10th day of this March, becauſe this is next enſuing the firſt day.

Paramor *verſus* Verrald.

4. IN Treſpaſs of Aſſault and falſe Impriſonment, by Robert Paramor againſt John Verrald, and others, ſuppoſed to be done at ſuch a Parish and Ward in London, the 20th day of May, 35 Eliz. The Defendants juſtifie by reaſon of an Execution upon a Recovery in the Court of Sandwich, within the Cinque-Ports, Debt, and traverſe Abſque hoc, in that they were guilty in London, &c. The Plaintiff reply and maintain the Aſſault and Impriſonment, as it is ſaid, and traverſes Abſque hoc quod habetur aliquod tale Recordum loquelæ prout, the Defendants have alledged, Et hoc paratus eſt verificare per Recordum illud, And upon this the Defendants demurred in Judgment: And per Curiam the Defendants Plea Prima facie was good, becauſe it was a ſpecial manner of Juſtification, which cannot be pleaded and alledged to be in any other place than where it was done, in the ſame manner as if they had juſtified by force of a Capias directed to the Sheriff of another County, than where the occaſion brought, or by Warrant of a Juſtice of Peace of another County, for matter of the Peace, and the like, which are not like to the Caſe of Partridge, who was beaten in the County of Gloceſter by Sir Henry Pole, for which he brought an Action in London: And Sir Henry Pole would have juſtified by Aſſault of the Plaintiff in the County of Gloceſter, with a Traverſe that he was not guilty in London: But it was then ruled in this Court, that he could not do it to ouſt the Plaintiff to ſue in London, but in ſuch a Caſe he might have alledged that the Aſſault was done in London, becauſe it was alſo a thing tranſitory, of which they ſhall take notice there, and ſo help himſelf if the matter had been true.

But in the Caſe at the Bar, if the ſpecial matter alledged in the Foreign County be falſe, as here, the Plaintiff may maintain his Action and traverſe the ſpecial Matter alledged by the Defendant: And ſo a Traverſe in ſuch a Caſe may be upon a Traverſe when Falſity is uſed, to ouſt the Plaintiff of that benefit which the Law gives him.

Hillary

Hillary Term, 38 *Eliz.*

Wood *verſus* Matthews.

1. IN a Writ of Error brought by Owen Wood, againſt Griffeth Matthews, upon a Judgment given in the Common Pleas, the Caſe was briefly thus.

The Iſſue in the Common Pleas was, whether one were taken by a **Cap. ad ſatisfaciendum**, or not, and upon the Trial thereof at the **Niſi prius**, the Jury found for the Plaintiff in this Action, **to wit**, that the Party was not taken by the ſaid **Capias**, and upon the back of the Pannel entred **dicunt pro Quer.** but on the back of the **Poſtea** the Clerk of the Aſſizes certified the Pannel thus, **to wit**, That the Jury ſay, that no **Capias** was awarded, which was otherwiſe than was put in Iſſue, or found by the Jury; and the Roll of the Record was according to the **Poſtea**, and upon this Judgment given for the ſaid **Matthew** then Plaintiff, upon which (amongſt other Errors) this variance between the Iſſue and Verdict was aſſigned for Error, and after Deliberation had upon this Point, and this matter alledged by the Defendant in the Writ of Error, and certified out of the Common Pleas, the Court awarded as to this Point that the Record ſent up out of the Common Pleas by the Writ of Error, ſhall be amended, according to that which was endorſed on the back of the Pannel, for the Endorſement upon the Pannel is the Warrant for the certifying of the **Poſtea**, and ſo this Warrant over to him that makes the Entry in the Roll: **And therefore whereas it was alledged that the** Poſtea **was amended in the Common Pleas after the Record removed, it was holden to be well done there; for although the Record were removed by the Writ of Error, yet the** Niſi prius, **the** Poſtea, **and the like remain ſtill there, as it is of the Warrant of Attorney, and the like: And if the** Poſtea **had not been amended there, but ſent up with that which was endorſed upon the Pannel, all ſhall be amended here according to that which was endorſed upon the Pannel, and according to this there was a Preſident ſhewn** Trin. 35 H. 8. **between** Whitſeild **and** Wright, **where the Iſſue was, whether a quantity of Grain were delivered between two Feaſts, and endorſed upon the Pannel** (Dicunt pro quer.) **and yet the** Poſtea **certified (and the Rolls alſo made) that the Delivery was made** ad feſta, **and upon this matter alledged in** Banco Regis, **and the Error in this Point aſſigned and certified out of the Common Pleas, the Record removed by the Writ of Error was by Award of the Court amended, and the word** (Ad) **razed out, and the word** (Inter) **written in lieu of it, according as it appeareth it ought to have been by the Note upon the back of the Pannel. And the like Amendment was made lately in the Chequer Chamber, upon Error brought there upon a Judgment given in** Banco Regis, **where the Indorſment upon the back of the Writ was** (pro Quer.) **and the** Poſtea **and Roll was, that the Plaintiff was guilty, and there amended the laſt Term.**

Slaning's *Caſe*.

NIcholas Slaning of Bickley **was ſeiſed in his Demeſn as of Fee, of the Manor of** Bickley, **and of a Mill in** Walkhampton, **in the County of** Devon, **called a** Blowing Mill: **and of another Mill there, called a** Knocking Mill, **and of an Acre of Land there alſo, and of divers other Manors and Lands in the ſaid County of** Devon, **the ſaid Mills and Acres of Land in** Walkhampton, **then being in the Poſſeſſion of one** Peterſeild, **and** Atwill, **of an**

an Eſtate for divers years then to come, and being ſo ſeiſed, he with Margaret his Wife levied a Fine of the ſaid Manor of Bickley, and of other Lands, omitting the ſaid Lands in Walkhampton, to certain Conuzees, who rendred the ſame back again to the ſaid Margaret Slaning for her life, with the Remainder over to the ſaid Nicholas and his Heirs: After which the ſaid Nicholas by Indenture dated 30 Octob. 21 Eliz. gave and enfeoffed all the ſaid Manors and Premiſſes to John Fitz and others, and the Heirs of the ſaid Fitz, to the Uſes, Proviſoes and Limitations mentioned in the ſaid Indenture, which was to the uſe of himſelf, and the Heirs Males of his Body, by any other Wife, the Remainder to Nicholas Slaning of Newton Ferries, and the Heirs Males of his Body, with divers Remainders over, with this Proviſo, to wit, Provided, and it is the intent of theſe Preſents, and of the Parties thereunto, that the ſaid John Slaning, and the Heirs Males of his Body, or the ſaid Nicholas Slaning of Newton Ferries, and the Heirs Males of his Body, in whomſoever of them the Inheritance in Tail of all the Premiſſes ſhall happen to be by force of theſe Preſents, ſhall pay to Agnes, the Daughter of the ſaid Nicholas Slaning of Bickly, 200 l. or ſo much thereof as ſhall be unpaid at the time of the death of her ſaid Father, according to the intent of his laſt Will, with a Letter of Attorney to it, by which he ordains John Hart and Robert Fort, jointly and ſeverally his Attorney to enter into the ſaid Manor of Bickley, Walkhampton, &c. and all other the Lands, Tenements and Hereditaments, in the ſaid Indenture mentioned, and Poſſeſſion for him to take, and after ſuch Poſſeſſion taken for him and in his name, to deliver full Poſſeſſion and Seiſin of the Premiſſes to the ſaid John Fitz, &c. according to the form and effect of the ſaid Indenture, whereupon Poſſeſſion and Seiſin was given of all but that which was in Poſſeſſion of the ſaid Peterfield and Atwill: And the ſaid Peterfield and Atwill, nor either of them never attorned to the ſaid Grant: After which Nicholas Slaning of Bickley made his laſt Will, by which he deviſed to the ſaid Agnes his Daughter 200 l. to be paid in form following, and not otherwiſe, to wit, an 100 l. thereof, in theſe words, On that day twelve-month next after the day of his death, and the other 100 l. that day twelve-month next after, &c. and made the ſaid John Slaning his Executor, and afterwards, to wit, the 8th day of April, 25 Eliz. died without Iſſue Male of his Body, the ſaid Agnes took to Huſband one Edmund Marley, and upon the 8th day of April, 26 Eliz. the ſaid John Slaning paid the firſt 100 l. to Agnes then being living, and upon the 8th and 9th days of April, 27 Eliz. Nicholas Slaning of Plumpton, Son and Heir of the ſaid John Slaning, who died (in the mean time) an hour before the Sun ſet, and until the Sun was ſet, came to the Houſe where the ſaid Edmund and his Wife inhabited in London, and tendred the laſt 100 l. and that neither the ſaid Edmund nor Agnes his Wife were there to receive it, but that the ſaid Edmund voluntarily abſented himſelf, becauſe he would not receive the 100 l. and that thereupon the Wife of the ſaid Edmund died, having Iſſue two Daughters, the Lands being holden by Knights Service in Capite, and the ſaid Daughters being yet within Age, and all this being found by Office, by the Opinions and Reſolutions of Popham and Anderſon, and the reſt of the Council of the Court of Wards, the ſaid Heirs now in Ward ſhall have nothing but that which doth not paſs by the Conveyance to John Fitz and his joynt Feoffees, which was only that which was in the Poſſeſſions of Peterfield and Atwill, and that the Livery was good of the reſt, albeit the Attorney did nothing of that which was in Leaſe, notwithſtanding the words of the Warrant, that they ſhould enter into all, and then ſhould make the Livery.

And they agreed, that the Condition doth not bind neither the ſaid John Slaning nor Nicholas his Son, becauſe they had not all the Land according to the purport of the Condition, which was, that he who had all thereof ſhould

pay

pay the 200 l. whereas here that which was in the Poſſeſſion of Peterfield and Atwill did not paſs to them for want of Attornment, for a Condition ought to be taken ſtrictly.

And further the Payment was referred by the Indenture to be according to the Will, or by the Will, and the 200 l. was deviſed as a Legacy, which ought to be paid upon Demand, and not at the peril of the Executor, and therefore the nature of the payment of it is altered by the intent of the Will, and being not demanded, there is no default in the ſaid Nicholas Slarſing of Plumpton, to prejudice him of his Land, if it had been a Condition, for then it ſhall be but a Condition to be paid according to the nature of a Legacy upon demand, and not at the peril of the Party. And whether the word twelve-month ſhall be taken for a year, or twelve months, according to 28 days to the month, as it ſhall be of eight or twelve Months, or the like. And they agreed that in this Caſe it ſhall be taken for the whole year, according to the common and uſual ſpeech amongſt Men in ſuch a Caſe, and according to this Opinion Wray (who is dead.)

Anderſon and Gawdy made their Certificate to the late Chancellor Sir Chriſtopher Hatton, in the ſame Caſe then being in the Chancery, and a Decree was made accordingly.

And many were of Opinion that by his abſence, by ſuch fraud he ſhall not take advantage of the Condition, being a thing done on purpoſe, if it had been to be performed at his peril.

Kelley's Caſe.

William Kelly and Thomaſine his Wife, were ſeiſed of certain Lands in S. Eth. in the County of Cornwall, called Karkian, to them and to the Heirs of their two Bodies between them lawfully begotten, by the Gift of one William Dowmand Father of the ſaid Thomaſine, 11 H. 8. a long time after which Gift, to wit, 25 H. 8. A Fine Sur conuſance de droit come ceo que il ad per, was levied by Peter Dowmand, Son and Heir of the ſaid William Dowmand to William Kelley of the Manor of Dowmand, and of an 100 Acres of Land, 300 Acres of Meadow, 300 Acres of Paſture, and a 1000 Acres of Furze and Heath in Dowmand, S. Eth. Treville, and divers other Towns named in the Fine, who rendred the ſame back again to the ſaid Peter in Tail, with divers Remainders over, and this Fine was with Proclamations according to the Statute, after which the Poſſeſſion of Karkian continued with Kelley and his Heirs, according to the firſt Intail; and the Manor of Dowmand, and the Remainder of the Lands in theſe Towns, which were to the ſaid Peter Dowmand to him and his Heirs according to the Render, until nine years paſt, that by Niſi prius in the Country upon the Opinion of Manwood late Chief Baron, the Land, called Karkian, was recovered againſt the Heir of the ſaid William Kelly, by virtue of the ſaid Fine and Render, becauſe all the Land which the ſaid Peter Dowmand, and the ſaid William Kelly alſo had in all theſe Towns named in the Fine, were not ſufficient to ſupply the Contents of Acres compriſed in the ſaid Fine: And what the Law was in this Caſe, was referred to the Chief Juſtices, the Maſter of the Rolls, Egerton, and the now Chief Baron out of the Chancery, who all agreed upon all this matter appearing, that nothing ſhall be ſaid to be rendred but that which indeed was given by the Fine, and Karkian does not paſs to the ſaid William Kelly by the Fine, for as to it, the Fine is but as a Releaſe of Peter to him, and therefore ſhall not be ſaid to be rendred to the ſaid Peter by the Fine, where no matter appeareth, whereby it may appear that it was the intent

tent of the Parties that this ſhall be rendred. And therefore Popham ſaid, that by ſo many Fines which have been levied in ſuch a manner, and to ſuch who have Land in the ſame Towns where the Conuſance hath been (conſidering that always more Land is compriſed in Fines by number of Acres, then Men have, or is intended to paſs) by them at ſome time, or in ſome Age, it would have come in queſtion if the Law had been taken as Manwood tok it, but in all ſuch Cales the Poſſeſſion hath always gone otherwiſe, which ſhews how the Law hath been always taken in ſuch Cales.

And therefore if a Man be to paſs his Manor of D. to another by Fine Executory, and he levy the Fine to him by the name of the Manor of D. and of ſo many Acres of Land in D. and S. being the Towns in which the Manor lies, after which the Conuzor purchaſeth other Lands in theſe Towns, the Fine before the Statute of Uſes ſhall not be executed of theſe Lands purchaſed after the Conuſance, and the Fine ſhall work to theſe which he had power and intent to paſs, and no further.

And it ſeemeth to them, that an Uſe may be averred without Deed upon a Fine ſur Render. And all agreed that if there had been a Deed to have declared the purport of the Fine, that the Fine ſhall not be taken to extend further than is compriſed in the Deed. And what is the cauſe thereof, the Deed or the intent of the Parties? and none can ſay but that it is the intent of the Parties, and not the Deed, and the intent may as well appear without the Deed, as with it, albeit it be not ſo concluſive by Parol as by Deed.

And therefore ſuppoſe I have 100 Acres of Land in a Cloſe in D. and I. S. hath another 100 Acres in the ſame Cloſe and Town, and I. S. hath 100 Acres of Land in the ſame Town out of this Cloſe, and my intent is to levy a Fine to I. S. of the whole Cloſe by the name of 200 Acres of Land, with a Render as before, and I levy it accordingly, ſhall the Render enure to the Land, which I. S. had in the ſame Town? It is clear that it ſhall not, although it be without Deed: Why then ſhall the Fine here be taken to work rather to the Land called Karkian, than to any other Lands which any other had in the ſame Towns, when it appeareth plainly, that it never was the intent of the Parties, that the Fine ſhould extend to theſe Lands called Karkian, and it was decreed in Chancery accordingly.

Hall *verſus* Arrowſmith.

4. IN the Cale between Hall and Arrowſmith, it was agreed by the whole Court in the King's Bench, That if a Copy-holder for life hath Licence to make a Leaſe for three years, if he ſhall live ſo long, and he makes a Leaſe for three years without ſuch a Limitation, that yet this is no Forfeiture of his Eſtate, becauſe the Operation of the Law makes ſuch a Limitation to the Eſtate which he made, to wit, that it ſhall not continue but for his life, and then ſuch an expreſs Limitation in the Caſe where the Law it ſelf makes it is but a meer triſle; and yet if a Leſſee for life makes a Leaſe for years, and he in the Reverſion confirm it, it remains good after the death of the Tenant for life, but this then ſhall be as if it had been made by him in the Reverſion himſelf, and ſhall be his Leaſe: But if the Leaſe there had been made determinable upon the life of Tenant for life, the Confirmation thereof by him in the Reverſion will not help him after the death of him who was Tenant for life. Cauſa patet.

But in the principal Cale, if the Copy-holder had had an Eſtate in Fee by Copy, it had been a Forfeiture of his Eſtate to make an abſolute Leaſe, becauſe in that Cale he does more than he was licenſed to do.

And they agreed that ſuch a Licence cannot be made to be void by a Condition ſubſequent to the Execution thereof, to undo that which was once well executed. But there may be a Condition precedent united to it, becauſe in ſuch a Caſe it is no Licence until the Condition performed; but the Licence before mentioned is not a conditional Licence, but a Licence with a Limitation, and therefore had not been of force, if the Limitation which the Law makes in this Caſe had not been, and the Limitation in Law ſhall be preferred before the Limitation in Deed, where they work to one and the ſame effect, and not different.

Arthur Johnſon's *Caſe.*

5. ARthur Johnſon was poſſeſſed of a Term for years, and ſo poſſeſſed, aſſigned this over to Robert Waterhouſe and John Waterhouſe, being Brothers to the Wife of the ſaid Johnſon, to the uſe of the ſaid Wife; the ſaid Johnſon dies, and makes his Wife his Executrix, after which the ſaid Wife takes Robert Witham to Husband, who takes the Profits of the Land during the life of his ſaid Wife, the Wife dies inteſtate, her ſaid Brothers being next of Kin to the ſaid Wife, took Adminiſtration as well of the Goods of the ſaid Wife, as of her firſt Husband. And whether the ſaid Water-houſes, or the ſaid Witham ſhall have this Leaſe, or the Uſe thereof, was the queſtion in the Chancery, and thereupon put to the two Chief Juſtices, upon which they and the Chief Baron, and all the other Juſtices of Serjeants Inn in Fleet-ſtreet, and Beamont alſo were clear in Opinion, that the ſaid Adminiſtrators had now as well the Intereſt as the Uſe alſo of the ſaid Term, as well in Conſcience as in Law, and that they had the Uſe as Adminiſtrators to the ſaid Wife, and that the ſaid Witham ſhall not have it, becauſe it is as a thing in Action, which the Adminiſtrators of the Wife always ſhall have and not the Husband. As if an Obligation had been made to the uſe of the Wife: And this Opinion was certified accordingly to the Lord Keeper of the great Seal of England, and it was ſo decreed.

Taunton *verſus* Barrey.

6. IN an Ejectione firmæ brought by Giles Taunton Plaintiff, in the King's Bench, againſt Giles Barrey Defendant, the Caſe was thus.

John Coles Eſquire, made a Leaſe of the Lands in queſtion to the Father of the ſaid Barrey, for divers years, depending upon the life of the Leſſee, and of the ſaid Defendant, and of the Survivor of them, upon condition that the ſaid Father ſhould not alien without the conſent of the ſaid Coles and his Heirs, after which the ſaid Father deviſed the Term to the ſaid Defendant and died, making his Executor, who aſſented; And the queſtion upon this Point found upon a ſpecial Verdict, was, whether upon the matter the Condition were broken; and by the Opinion of the whole Court adjudged that it was, for in ſuch a Caſe he ought to have left it to his Executor, without making any Deviſe of it, for the Deviſe is an Alienation againſt him, and therefore it was agreed that the Plaintiff ſhould recover the Term, 37 Eliz. Rot. between Roper and Roper.

Mich. Term, 38 & 39 Eliz.

Everet's *Caſe.*

1. THis Caſe was moved by the Chief Juſtice to the other Chief Juſtices at Serjeants Inn in Fleet-ſtreet, concerning one Everet, who before was attaint for ſtealing of an Horſe, and reprieved after Judgment, and indicted again for ſtealing another Horſe before this Attainder: And the Vicar of Pelton, in the County of Somerſet was indicted as acceſſary before this Felony, for the procurement of it; and Everet being again indicted upon the laſt Indictment, did not plead that he was formerly indicted of another Felony, &c. but acknowledged the Indictment whereby the Acceſſary was arrained, tried, and found guilty, and had his Judgment alſo as the Principal, but the Execution of the Accellary was reſpited: And now moved whether upon this matter it ſhall be fit to execute the Accellary, the Principal being executed.

And it ſeemed convenient to all the Juſtices and Barons that he ſhall be executed, and that the matter was clear in this Caſe, becauſe the Principal did not take advantage of his firſt Attainder by way of Plea, but acknowledged the Deed, in which Caſe the Accellary may well be arraigned: But if the Principal had pleaded his former Attainder, whether now he ſhall be put to anſwer for the benefit of the Queen, having regard to this Accellary, who otherwiſe ſhall go quit, becauſe there was not any principal, but he who was formerly attainted.

And it ſeemed to Popham and ſome others, that it ſhall be in the ſame manner, as if the ſame Perſon ſo formerly attainted ſhould be tried now for Treaſon, made before his Attainder, as appeareth by 1 H. 6. 5. becauſe it is for the advantage of the King in his Eſcheat of the Land: and notwithſtanding, that it is moved by Stamford in his Pleas of the Crown, it ſeemed to Popham that there was no diverſity where the Treaſon was made before the Felony of which he is attainted, and where after and before the Attainder; And by the ſame reaſon that he ſhall be again tried for the benefit of the King in this Caſe becauſe of the Eſcheat, by the ſame reaſon in this Caſe here, becauſe of the Forfeiture which accrueth to the Queen by the Attainder of the Accellary, and for the Juſtice which is to be done to a third Perſon, who otherwiſe by this means ſhall eſcape unpuniſhed.

But he agreed, that the Party attainted ſhall not be again arraigned for any other Felony done before the Attainder, in caſe where no Accellary was touched before the Statute of 8 Eliz. cap. 4. he who is convict of Felony, and hath his Clergy after his Purgation made, ſhall be arraigned for another Felony done before the Conviction, if it be ſuch for which he cannot have his Clergy, and was not convicted or acquitted of the ſame Felony before the Attainder: But upon this Statute it appeareth, that he who ſhall have his Clergy in ſuch manner, ſhall not be drawn in queſtion for any other Felony done before his Attainder, for which he might have his Clergy.

And of this Opinion (as Clark and others of the Juſtices ſaid) were all the Juſtices in the time of Wray. And as to the Statute of 18 Eliz. cap. 7. It is not to be underſtood but that he who hath his Clergy, and delivered according to this Statute, ſhall be yet arraigned for any other Felony done before his former Conviction or Attainder, if it be ſuch for which he cannot have his Clergy; for the words are, That he ſhall be put now to anſwer, &c. in the ſame manner as if he had bin delivered to the Ordinary, and had made his Purgation, any thing in this Act to the contrary notwithſtanding.

Pollard *verſus* Luttrell.

2. IN an Ejectione firmæ betwéen Pollard and Luttrell for Lands in Hubury and Liſtock, upon a Title betwéen the Lord Audeley and Richard Audeley, it was agréed by the Chief Juſtices, that if the Diſſeiſor levy a Fine with Proclamations accoꝛding to the Statute of 4 H. 7. and a Stranger within five years after the Proclamations enter in the Right of the Diſſeiſée, without the Privity oꝛ Conſent of the Diſſeiſée, that this ſhall not avoid the Bar of the Fine, unleſs that he aſſent to it within the five years, for the woꝛds of the Statute are, ſo that they purſue their Title, Claim oꝛ Intereſt by way of Action, oꝛ lawful Entry within five years, &c. and that which is done by another without their Aſſent, is not a purſuing by them accoꝛding to the intent of the Statute, for otherwiſe by ſuch means againſt the Will of the Diſſeiſée, every Stranger may avoid ſuch a Fine, which was not the intent of the Statute.

Mountague *verſus* Jeoffreys *and others.*

3. IN Treſpaſs by Edward Mountague Plaintiff, againſt Richard Jeoffreys and others Defendants, for a Treſpaſs done in certain Lands called Graveland, in Hailſham in the County of Suſſex, the Caſe upon a Special Verdict was thus.

Sir John Jeoffreys late Chief Baron, being ſeiſed in his Demeſn as of Fee (amongſt others) of the ſaid Land called Graveland having Iſſue but one only Daughter, by his Will in Writing deviſed all his Land of which he was ſeiſed in Fee (except the ſaid Graveland) to his ſaid Daughter for 21 years, &c. and the ſaid Land called Graveland (which was then in Leaſe for divers years, to one Nicholas Cobb, which years at the time of the death of the ſaid Sir John Jeoffreys continued) he deviſed to the ſaid Richard Jeoffreys his Brother, and his Heirs, and by the ſame Will he diſpoſed divers Legacies of his Chattels, and the Remainder he gave to his ſaid Daughter, and made her Executrix of his ſaid Will; after which the firſt Wife of the ſaid Sir John Jeoffreys being dead, he covenanted with Mr. George Goꝛing to take the Daughter of the ſaid George to Wife, and covenanted with the ſaid George (amongſt other Lands) to aſſure the ſaid Land called Graveland to the ſaid George Goꝛing and Richard Jeoffreys, and their Heirs, to the uſe of the ſaid Sir John Jeoffreys, and Mary Goꝛing Daughter of the ſaid George, and the Heirs of the ſaid Sir John Jeoffreys, by a certain day, before which day the Marriage being had, the ſaid Sir John Jeoffreys made a Deed and ſealed it, and delivered it, containing a Feoffment of the ſaid Land called Graveland (amongſt others) to the ſaid George Goꝛing and Richard Geoffreys, and their Heirs, to the Uſes aforeſaid, in performance of the ſaid Covenants, with a Warrant of Attorney to make Livery accordingly, and the Attorney made Livery in other parts of the Land, and not in Graveland, and this was in the name of all the Lands compriſed in the Deed, and the ſaid Nicholas Cobb never attorned to this Deed; After which Sir John Jeoffreys interlined in the ſaid Will, that the ſaid Mary then his Wife ſhould be joynt Executrix with his Daughter: And in the Legacy of the reſt of his Goods, &c. he interlined the ſaid Mary his Wife to be Joynt-Tenant with his ſaid Daughter, without other Publication thereof; and afterward the ſaid Sir John died, the ſaid Daughter being his Heir, who took to Husband the ſaid Edward Mountague.

4. IN Treſpals, the Plaintiff ſuppoſed the Treſpals to be done in the breaking of his Houſe and Cloſe in ſuch a Town, the Defendant juſtifies in an Houſe and Cloſe in the ſame Town, and ſhews which, to put the Plaintiff to his new Aſſignment, to which the Plaintiff replied that the Houſe and Cloſe of which he complains is ſuch an Houſe, and gives it a ſpecial name, upon which the Defendant demurs, and adjudged that the Plaintiff take nothing by his Writ: for albeit an Houſe may have a Curtilage which paſſeth by the name of a Meſſuage with the Appurtenances, yet this ſhall not be in this Caſe, for by the Bar the Plaintiff is bound to make a ſpecial Demonſtration in what Meſſuage and what Cloſe he ſuppoſeth the Treſpals to be done, as to ſay that the Houſe hath a Curtilage, the which he broke, and it ſhall not be taken by Intendment that the Meſſuages had ſuch a Curtilage to it, if it be not ſpecially named.

Fennor's *Caſe*.

5. IN Treſpals brought by Fennor in the Common Bench, againſt for breaking his Cloſe in, &c. the Defendant pleads a Bar at large, to make the Plaintiff aſſign the place in certain, where he ſuppoſeth the Treſpals to be done, the Plaintiff thereupon alledgeth that the place where he complaineth is ſuch, &c. and ſheweth in certain, another then that in which the Defendant juſtifies, the Defendant avers that the one and the other are all one, and known by the one name and the other, and thereupon the Plaintiff demurs, and adjudged there for the Plaintiff, becauſe that in ſuch a Caſe upon ſuch a ſpecial Aſſignment, it ſhall be taken meerly another than that in which the Defendant juſtifies, in as much as the Plaintiff in ſuch a Caſe cannot maintain it upon his Evidence given, if the Defendant had pleaded Not Guilty to this new Aſſignment, that the Treſpals was done in the place in which the Defendant juſtifies, although it be known by the one and the other name, and that the Plaintiff hath good Title to it, becauſe that by his ſpecial Aſſignment, ſaying, that it is another than that in which the Defendant juſtifies, he ſhall never after ſay, that it is the ſame in this Plea, for it is meer contrary to his ſpecial Aſſignment: And upon this a Writ of Error was brought in the King's Bench, and the Judgment was there affirmed this Term for the ſame reaſon, Quod nota.

Scot *verſus Sir* Anthony Mainy.

6. IN Debt upon an Obligation of 200 l. brought by John Scot Gent. againſt Sir Anthony Mainy Knight, the Condition whereof being to perform the Covenant compriſed in an Indenture of Demiſe made by the ſaid Sir Anthony to the ſaid Plaintiff, of his Capital Meſſuage in Holden with the Lands to it belonging, &c. amongſt which Covenants one was, that whereas by the ſame Indenture he had demiſed it to him for 21 years, that the ſaid Sir Anthony covenanted with the ſaid John Scot, that the ſaid Sir Anthony from time to time, during the life of the ſaid Sir Anthony, upon the Surrender of this Demiſe, or any other Demiſe hereafter to be made by the ſaid Sir Anthony, of the ſaid Meſſuages and Lands, and to be made by the ſaid John Scot, his Executors or Adminiſtrators, and upon a new Leaſe to be made ready ingroſſed to be ſealed and offered by the ſaid John Scot, his Executors or Adminiſtrators to the ſaid Sir Anthony, for the like term and number of years in the aforeſaid Indenture compriſed for the ſame Rent, &c. to ſeal and deliver to the ſaid John Scot, his Executors and Adminiſtrators. And the ſaid Sir Anthony as to this Covenant pleaded, did not ſurrender, nor offer to ſurrender to him the ſaid Demiſe, nor offer to him any new Demiſe of the Premiſſes, ready ingroſſed for to ſeal it for the like term, &c. as it is in the Covenant.

And

And for the other Covenants he pleads Performance of all; To which the Plaintiff replies, that the ſaid Sir Anthony after the Obligation, and before the Action brought, had rendred the ſaid Meſſuages and Lands by Fine to one Walter Savage and William Sheldon their Executors and Aſſigns for eighty years, from the Feaſt of Eaſter next before the Fine which was Paſch. 36 Eliz. whereby he ſaid, that the ſaid Sir Anthony had diſabled himſelf to renew his Leaſe according to the Covenant, upon which it was demurred in the Common Bench, and the Judgment given for the Plaintiff, as appeareth, Trin. 37 Eliz. Rot. 2573. And upon this Judgment a Writ of Error was brought in the King's Bench and agreed this Term. And it was moved that the Judgment given was erroneous, in as much as the firſt Act was to be done by John Scot before the new Leaſe was to be made, to wit, the Surrender of the former Leaſe, and the drawing of the new one ought to have been done by the Plaintiff, which not being done on his part, the ſaid Sir Anthony is not bound to make the new Leaſe.

And alſo it was moved, that as the Caſe is here, the ſaid John Scot might ſurrender to the Defendant, notwithſtanding the intervening of this Leaſe between the Leaſe of the Plaintiff, and the Inheritance of the Defendant, as if a Man make a Leaſe for years in Poſſeſſion, and afterwards make another Leaſe to a Stranger, to begin after the end of the former Leaſe, this ſhall not hinder but that the firſt Leaſe may be ſurrendred to him who was the Leſſor, notwithſtanding the ſaid Term intervening.

To which it was anſwered by the Court, that the Plaintiff here need not to make an Offer of the Surrender of his Term to the ſaid Sir Anthony, in as much as the ſaid Sir Anthony hath diſabled himſelf to take the Surrender, or to take the Leaſe according to the purport of the Condition, and by this diſabling of himſelf the Obligation is forfeited, Come per 44 E. 3. 8. and by Littleton alſo, If a Man make a Feoffment, upon condition to re-enfeoff him, this is not to be done until Requeſt thereof be made by the Feoffor, yet if in the mean time the Feoffee ſuffer a fained Recovery of the Land, grant a Rent-charge, acknowledgeth a Statute, taketh a Wife, or the like, the Feoffor may re-enter, without Requeſt made to re-enfeoff him, and the reaſon is, becauſe that by any of theſe the Feoffee hath diſabled himſelf to perform the Condition in the ſame plight, as he might have done at the time of the Feoffment, in the ſame manner here, for by this Render by the Fine, the Reverſion paſs in Right, ſo that the Termor in Poſſeſſion attorning to it, they ſhall have the Rent reſerved upon the firſt Leaſe, and therefore the Plaintiff cannot now ſurrender to the ſaid Sir Anthony, but to the Grantees of the Reverſion, and therefore there ſhall be no prejudice to the Plaintiff, becauſe the Defendant was the cauſe of diſabling the Plaintiff to make the Surrender to him. And ſuppoſe it be but a Term to begin at a day to come, yet by this the Obligation is forfeited, becauſe the Obligor hath thereby diſabled himſelf to perform the Condition in ſuch a plight as he might have done it when the Obligation was made, whereby the Obligation is preſently forfeited, albeit the Plaintiff never ſurrender nor offer to do it: And therefore the Judgment there was affirmed.

Mounſon *verſus* Weſt.

7. IN an Aſſile brought in the County of Lincoln, before Gawdy and Owen, by Thomas Mounſon Eſquire, Demandant, againſt Robert Weſt Tenant for Lands in Sturton, Juxta Stu. The Defendant Weſt pleaded Nul Tenant del Franc-tenement named in the Writ, and if that be not found, then Nul tort, nul diſſeiſin: And the Aſſile found that the ſaid Defendant was Tenant of the Tenements now in Plaint, and put in view to the Recognitors of the Aſſile,

Aſſiſe, in manner and form as the Writ ſuppoſeth: And further that the ſaid Weſt thereof diſſeiſed the ſaid Mounſon namely of the Tenements in the Will of one Mounſon: And did not find either the words of the Will, nor the Will it ſelf what it was, &c. And the Juſtices of Aſſiſe upon this Verdict upon Advice with the other Juſtices, gave Judgment, that the Plaintiff ſhall recover, &c. upon which a Writ of Error was brought in the King's Bench, where it was moved that the Judgment was erroneous: Firſt becauſe the Jury have not found that the Defendant was Tenant of the Free-hold, agreeing with the form of the Plea, for the Writ of Aſſiſe doth not ſuppoſe him to be Tenant of the Free-hold, and therefore the Verdict in this Point not fully found.

The ſecond Error is, that the Seiſin of the Plaintiff is not enquired of, according to the Charge given to them, as well as the Diſſeiſin, for the Charge was that they ſhould enquire of the Seiſin of the Plaintiff, &c. But to both theſe the Court anſwered that the Verdict was well enough, notwithſtanding theſe Exceptions, for every Aſſiſe brought ſuppoſeth that there is a Diſſeiſor, and a Tenant named in it, then this Aſſiſe being brought againſt a ſole Perſon, ſuppoſeth him to be a Diſſeiſor and Tenant alſo; and therefore the Verdict ſaying, that he was Tenant as the Writ ſuppoſeth, is now as ſtrong in this Caſe, as if they had found that he was Tenant in the Free-hold, for the Tenant of the Free-hold ought to be named in the Writ: But if the Aſſiſe had been brought againſt two, or more, ſuch a Verdict had not been good, for it ſufficeth if any of them be Tenant of the Free-hold, and then the Writ doth not ſuppoſe one to be Tenant more than another, but ſuppoſeth one Tenant to be named in the Writ. And therefore in ſuch a Caſe the finding ought to be ſpecial, to wit, that ſuch an one is Tenant of the Free-hold, or that there is a Tenant of the Free-hold named in the Writ. But where one only is named in the Writ to be Diſſeiſor and Tenant, it is ſufficient to find as here, for by this it is certainly found that he is Tenant of the Free-hold.

And for the other Point, although it be a good direction for the Judges to the Jury, whereby they may the better perceive that there ought to be a Seiſin in him, or otherwiſe there cannot be a Diſſeiſin by the other, yet in Deed he cannot be Diſſeiſed who was not then ſeiſed: But the Aſſiſe having found the Diſſeiſin, the Seiſin in Law is found included in the Diſſeiſin. But for the Point moved, that the Verdict was not perfect, in as much as they found the Diſſeiſin with a Niſi, it ſeemed to Gawdy that the Judgment upon the Verdict was erroneous, as where a Verdict in another Action is imperfect, a Venire facias de novo ſhall be awarded to try the Iſſue again: And if Judgment be given upon ſuch a Verdict it is Error; ſo here the Verdict in this Point being uncertain, there ought to have been a Certificate of Aſſiſe to have this better opened: But the three other Juſtices held (as the Caſe is) that the Verdict in this Point is certain enough, for that which cometh before the Niſi (as it is plaied) is meerly nugator. as in the Caſe of the Lord Stafford againſt Sir Rowland Heyward, the Jury found Non aſſumpſit, but if ſuch Witneſſes ſay true (as they believe they did) Aſſumpſit, &c. it was but a meer Nugation.

But it ſeemed to Popham, that if the Verdict had been, if the words of the Will do not paſs the Land, then that he diſſeiſed, and if they paſs, then that he did not diſſeiſe; there if the words of the Will be not found, the Verdict had been all imperfect, but here the Verdict is full and perfect before the Niſi, &c. and therefore the Judgment was affirmed.

Holme

Holme *verſus* Gee.

8. A Formedon in Deſcender was brought by Ralph Holme Demandant againſt Henry Gee and Elizabeth his Wife Tenants, and the Caſe was thus.

Ralph Langley and others gave two Meſſuages and a Garden, with the Appurtenances in Pancheſter, to Ralph Holme the great Grandfather of the Demandant, and to the Heirs of his Body begotten, after which the ſame great Grandfather by Deed indented, dated 20 September, 14 H. 7. enfeoffed John Gee of one of the ſaid Meſſuages, and of the ſaid Garden, rendring yearly to the ſaid great Grandfather and his Heirs 13 s. 4 d. a year, at the Feaſts of S. Michael, and the Annunciation by equal Portions, after which the ſaid John Gée died ſeiſed of the ſaid Meſſuages and Garden, and it deſcended to Henry Gée his Son and Heir; after which the ſaid great Grandfather by his Indenture, bearing date 6 Martii, 12 H. 8. enfeoffed the ſaid Henry Gée of the other Meſſuages, rendring alſo to him and his Heirs yearly 13 s. 4 d. at the ſaid Feaſts aforeſaid, by equal Portions, after which Holme the great Grandfather died, Stephen Holme being his Son and next Heir, who was ſeiſed of the Rents aforeſaid, and afterwards alſo died ſeiſed, Robert Holme being his Son and Heir, after which the ſaid Henry Gée died ſeiſed of the ſaid two Meſſuages and Garden, and they deſcended to Elizabeth his Daughter and Heir, who took to Husband one Richard Shalcroft, and had Iſſue the ſaid Elizabeth, Wife of the ſaid Henry Gée, Tenant in the Formedon, after which the ſaid Richard Shalcroft and his Wife died, after which, and before the Marriage had between the ſaid Henry Gée and Elizabeth now Tenants in the Formedon, the ſaid Elizabeth enfeoffed one Richard Grænlearch of the ſaid Meſſuages and Garden, after which, to wit, at the Feaſt of the Annunciation of our Lady, 3 Eliz. the ſaid Henry Gée Husband to the ſaid Elizabeth, paid 13 s. 4 d. for the ſaid Rent reſerved as is aforeſaid, to the ſaid Robert Holme, after which, to wit, on Monday next, after the Aſſumption of our Lady, at Lancaſter, before the Juſtices there, a Fine was levied with Proclamations according to the Statute, between Thomas Aynſworth and Thomas Holden then being ſeiſed of the Tenements aforeſaid Complainants, and the ſaid Henry Gée and Elizabeth his Wife, Deforceants of the Tenements aforeſaid, whereby the Conuſance was made to the ſaid Thomas, and Thomas who rendred them to the ſaid Henry Gée and Elizabeth his Wife, and to the Heirs of their Bodies, the Remainder to the right Heirs of the ſaid Henry: the five years paſt after the Proclamations in the life of the ſaid Robert Holme, after which the ſaid Robert died, and Ralph his Son and Heir brought the Formedon upon the Gift firſt mentioned, and the Tenants plead the ſaid Fine with Proclamation in Bar, and the Demandant replied, ſhewing the ſeveral Diſcontinuances made by the great Grandfather as aforeſaid, and the Acceptance of the ſaid Rent by the ſaid Robert, by the hands of the now Tenant Henry Gee as is before alledged, and that the ſaid Henry was then ſeiſed of the ſaid Tenements in Fee in Right of the ſaid Elizabeth then his Wife, and although that he alledged the ſaid ſeveral Feoffments to be made by Deeds indented, with the Reſervation as aforeſaid, yet it is not mentioned in the Replication that he ſhews forth the Deeds whereby the Reſervation was made; to which the Tenant by way of Re-joynder ſhew the Feoffment made by the ſaid Elizabeth Shalcroft to the ſaid William Greenditch, whereby he was ſeiſed at the time of the Payment of the ſaid Rent at the ſaid Feaſt of the Annunciation of our Lady, and traverſe Abſque hoc, that the ſaid Henry Gee was thereof then ſeiſed in Right of his Wife, in manner and form, whereupon it was demurred in Law, and adjudged by the Juſtices of Aſſiſe at Lancaſter, that the Plaintiff ſhould be barred, whereupon the Tenants have now brought their Writ of Error.

And

And by Popham and Clench the Judgment is to be affirmed; Firſt, becauſe that the Acceptance of the ſaid Rent had bæn by the hands of one who was to pay it, to wit, the Tenant himſelf, yet this ſhall not bar the Right of Intail in the ſaid Robert Holme (as a Releale of his Right ſhould do) but this Acceptance ſhall only foꝛeclole him of his Action, to demand the Land during his life, and thereforꝛe the Right which the ſaid Robert had, being barred by the Fine, the Son is without Remedy, foꝛ the Son ſhall never have Remedy upon the Fine levied in time of his Father, the five years after the Proclamations being paſſed: But in Caſe where the Right begin firſt to be a Right in the Son, and not where there was Right in the Father.

And further it ſæmed to them, that the Payment of him who had not any thing in the Land at the time of the Payment, as here, ſhall make no concluſion to him who accept it, becauſe this Payment is as none in Law.

And by them the Rejoyndure of the Traverſe, Abſque hoc, that Henry Gee was ſeiſed at the time of the Payment in Fæ, in Right of his ſaid Wife, in manner and foꝛm, as in the Replication is alledged, is gwd enough, foꝛ he traverſeth that which the Demandant hath ſpecially alledged to deſtroy the War, and contrary to that which is alledged, it ſhall not be intended that they had other particular Eſtate at the time of the Payment, which may make the Payment to be gwd.

And albeit the Traverſe had bæn, Abſque hoc, that the ſaid Henry was ſeiſed in Right of his ſaid Wife, Modo & forma prout, the Demandant hath alledged without ſaying in Fæ, as it is pleaded here, yet the Jury ſhall be put to find it, if he were ſeiſed in Fæ, In jure Uxoris, and not of any other particular Eſtate, as in 12 E. 4. 4. A Feoffment is pleaded by Dæd, the other makes Title, and traverſeth Abſque hoc, that he enfeoffed Modo & forma, not ſhewing foꝛth the Dæd, yet he who pleads the Feoffment, by Littleton, ſhall give no other Feoffment in Evidence, than that which is pleaded by the Dæd. And by 18 E. 4. 3. In Treſpals the Defendant juſtifies the Entry and ſowing of Coꝛn, becauſe that M. was ſeiſed in Fee, and ſowed the Land, and the Defendant as his Servant entred and cut it, the Plaintiff ſaith, that it was his Fræ-hold at the time of the ſowing, Abſque hoc, that it was the Fræ-hold of the ſaid M. and per Curiam, it is not gwd, foꝛ ſuch matter was not alledged by the Defendant, but he ought to traverſe the Seiſin in Fæ, which was alledged, and gwd, and ſo it is gwd here.

But it ſæms to Clench, that the Replication is not gwd, becauſe he doth not ſay, by the Writing upon which the Reſervation was made, which concludes Robert by his Acceptance, Hic in Curia prolat. as by Hill. 15 E. 4. 15. If a Man will bar a Woman of her Action foꝛ her Land after the death of her Husband, by Feoffment made by the Baron and Feme, during the Coverture by Dæd, rendring Rent, by reaſon of Acceptance of the ſaid Rent after the death of her Husband, he ought to ſhew the Dæd, and ſay, Hic in Curia prolat. oꝛ otherwiſe the Plea is not gwd, becauſe that in ſuch a Caſe albeit it were a Gift in Tail, the Wife ſhall not be concluded by her Acceptance unleſs that the Gift were by Dæd.

Popham, True it is, in caſe the Party will demur upon it: but ſuppoſe in this Caſe, the Tenants had expreſly acknowledged the ſaid Feoffments, and then concluded afterwards as they have done here, ſhall they afterwards take advantage of not ſhewing the Deed? I think that not, no moꝛe here where they admit it, and plead the other matter to avoid the Concluſion; foꝛ if a double Plea be pleaded, if the other Party demur upon it, he ſhall take the advantage of the doublenels: But if he paſs it oder, and they proceed in pleading upon another Point, the doublenels is gone.

And Fennor said, that the Right which is intended to be saved within the first Branch of the Statute of 4 H. 7. is, that upon which the Party may pursue his Action, or enter for his Remedy, the which the said Robert could not do in, when the Fine was levied, because he had accepted the Rent, but the first Right which was in such a Case, was that in the Demandant.

Stroud *versus* Willis.

9. IN Debt upon an Obligation of 40 l. by William Stroud Plaintiff, against John Willis Defendant, the Condition whereof was, If the said Willis his Heirs, Executors, or Alligns, should pay or cause to be paid yearly to the said William Stroud, the Rent, or sum of 37 l. 10 s. of lawful Money, at the Feast of S. Michael, and the Annunciation, by equal portions, according to the Tenure, true intent, and meaning of certain Articles of Agreement indented, made between the said Parties of the same date, that the Obligation was, that then the Obligation shall be void, and the Defendant shews the Articles, which were thus, to wit, that the said William Stroud had demised to the Defendants all such Tenements in Yeatminster of, or in which the said William then had an Estate for life by Copy. Anglice Copie des, except according to the custom of the Mannor of Yeatminster, from the Annunciation of our Lady then last past, for forty years, if the said William should so long live, rendring yearly to the said William 37 l. 10 s. of lawful Money, at the Feasts of S. Michael, and our Lady, by equal portions, under the East-Gate of the Castle of Taunton, in the County of Somerset, &c. with divers things comprised in the said Articles. To which Points the Defendant pleaded, that at the time of the making of the said Articles the Plaintiff had not any Estate in the Tenements in Yeatminster aforesaid, for Term of his life, by Copy, Anglice Copie des, except according to any Custom of the said Mannor of Yeatminster, and that the Obligation was made for the Payment of the same Rent reserved by the said Articles, and demands Judgment, &c. Whereupon the Plaintiff demurred in the Common Bench, and there Judgment was given that the Plaintiff should recover his Debt and Damages, as appeareth there, Mich. 36 & 37 Eliz. Rot. 312. upon which a Writ of Error was brought in the King's Bench, and there moved that the Judgment was erroneous, in as much as upon the matter he ought to have been barred of his Action: for if an Action of Debt had been brought upon the Demise, by the Articles, the Defendant might have pleaded as here, and the Plaintiff should be clearly barred: As if a Man be bound to make an Estate, or to assure to another all the Lands which he hath by Descent from his Father, or all the Lands which he hath by Purchase from such an one, or the like.

And of this Opinion Gawdy was, saying, in as much as the Obligation is, that he shall be paid according to the true intent of the Articles, the intent of them is not that the Rent shall be paid if any Land be not passed by them, for it should be paid, as by 22 H. 6. if a Man be bound to pay a Rent which is reserved upon a Leale made to him, he ought to pay it at his peril: But if it be to pay it accordingly to the Leale, there he said, it is not payable but upon the Bond, and is to be paid as a Rent. And if the Land be evicted in the interim before the day of payment, the Obligor shall help himself by pleading of it upon such an Obligation to discharge the Bond, so here: But it seemed to Popham, that the Judgment was well given, and yet he agreed the Cases that were put; but he said there was a Diversity where the Obligation goes in the Generality, and where it tends to a Specialty: for as by 2 E. 4. If a Man be bound to be Nonsuit in all Actions which he hath against such

ſuch an one, or to aſſure to another all his Lands in Dale, he may ſay, that he hath not any Suit, or that he hath no Land in Dale: But if it be that he ſhall be Nonſuit in a Formedon depending, or to enfeoff him of White Acre, there it is no Plea, becauſe he refers to a ſpecial Point. And by 18 E. 4. If a Man be bound to another to pay him 10 l. for which a Stranger is bound to the ſaid Obligee, it is no Plea for him to ſay, that the Stranger is not bound to pay him 10 l. for when the Condition refers to ſuch a ſpecial matter, this cannot be denied of him who is bound.

And therefore in this Caſe the Defendant cannot ſay, that there were not any ſuch Articles, contrary to that which is ſpecially compriſed in the Condition, as by 28 H. 6. A Man was bound to perform the Covenants compriſed in a certain Indenture of Covenants, he ſhall not ſay, that there was not any ſuch Indenture, becauſe it reſorts to a Special.

So I think, if a Man be bound to pay the Rent of 10 l. a year reſerved upon an Indenture of Demiſe made of Lands in D. payable at ſuch a Feaſt, he ſhall not ſay againſt it, that there was no ſuch Demiſe made, nor no ſuch Rent reſerved upon the Demiſe, but is eſtopped of the one and the other. And in Hill. 3 Eliz. A Man was bound that he ſhall pay to A. or the Obligee, all ſuch ſums of Money as T. S. deceaſed ſtands bound to pay by his Obligation to the ſaid A. and of one R. P. to the behoof of the Children of ſuch an one, according to the Will of the ſaid Party; and in Debt upon this Obligation he ſaith, that the ſaid T. S. was never bound by any ſuch Writing Obligatory to the ſaid A. and R. P. &c. to pay, &c. Pro uſu filiorum, &c. as in the Condition, and per Curiam adjudged no good Bar, becauſe he is eſtopped to deny the ſpecial matter, which is matter of Writing, and not a bare matter in Deed.

Kirton *verſus* Hoxton, *and others.*

10. IN an Appeal of Mayhem brought by Kirton Plaintiff, againſt Robert Hoxton Eſquire, and divers other Defendants, the one of the Defendants plead Nul tiel in rerum natura, as another of the Appellées, and if it be not found then as to the Felony and Mayhem Not Guilty: Agreed by the whole Court that ſuch a manner of pleading is not to be ſuffered in an Appeal of Mayhem, becauſe no Life is put in danger by the Suit: And yet it was objected that there are preſidents, that ſuch form of pleading hath been admitted in Appeals of Mayhem. But the Court had reſpect to it, that the reaſon in all the Books of Law in which it hath been admitted in an Appeal of death, and the like, is, that it ſtands in Favorem vitæ, and therefore it is admitted to be good, or otherwiſe by the Books, it ſhall not be admitted to be ſo, for the doubleneſs of it: But no Life is to be put in jeopardy in this Caſe, and therefore ſuch a Plea ſhall not be admitted, but the Not Guilty ſhall ſtand, by which the other Plea is waived. Appeal of *Mayhem.*

Hillary Term, 38 *Eliz.*

Henry *Earl of* Pembrook *verſus Sir* Henry Barkley.

See this Caſe *Coke lib.* 5. 76. *a.*

IN an Action upon the Caſe, between Henry Earl of Pembrook Plaintiff, and Sir Henry Barkley Knight Defendant, the Caſe upon the pleading appeareth to be thus.

The ſaid Earl was ſeiſed in his Demeſn as of Fee, of the Manor of Stocktrift, in the County of Somerſet, to which manner the Office of the cuſtody of the Foreſt of Selwood, in the ſame County belongeth, and alſo that there was before time of memory, an Office within the ſame Foreſt called the Lieutenantſhip, or Cuſtody of the ſaid Foreſt belonging to the ſaid Mannor, of which alſo the ſaid Earl was ſeiſed in his Demeſn as of Fee: And that there was one part of the ſaid Foreſt called the Weſt part of the ſaid Foreſt, in which there were two Walks, or Bayliwicks, the one called Stavertale Walk, and the other Brewick Walk: And that the ſaid Lieutenant had the Charge of the Deer, and the Diſpoſition and Appointment of the Keepers of the ſaid Foreſt. And that the ſaid Earl being ſo ſeiſed, by his Writing, bearing date 5 Novemb. 12 Eliz. reciting that his Father had granted the Office of Lieutenantſhip, and Deputyſhip, of the ſaid Weſt part of the ſaid Foreſt, Cum vadiis, &c. quando acciderit, and the Keeperſhip of Brewick Walk aforeſaid, to the ſaid Sir Maurice Barkley Knight, and the Heirs Males of his Body, and inſtituted and ordained him, and the Heirs Males of his Body, Lieutenant and Deputy thereof to the ſaid Earl and his Heirs, confirmed the Grant aforeſaid.

And further by the ſame Deed granted and confirmed to the ſaid Sir Maurice, and to the Heirs Males of his Body, the ſaid Lieutenantſhip and Deputyſhip of the ſaid Weſt part of the ſaid Foreſt, and alſo the Keeperſhip of the ſaid Walk called Stavertale Walk, together with the Lodges, &c.

Provided always, and the ſaid Sir Maurice covenanted and granted, for him and the Heirs Males of his Body, with the ſaid now Earl his Heirs and Aſſigns, that it ſhall be lawful for the ſaid Earl his Heirs and Aſſigns, to have all the Preheminence or Commandment of the ſaid Game and Hunting, and pleaſure there, as if this Grant had not been made.

Provided alſo, and the ſaid Sir Maurice covenanted, granted and promiſed for him, and the Heirs Males of his Body, to, and with the ſaid Earl, his Heirs and Aſſigns, that the ſaid Sir Maurice and the Heirs Males of his Body, and their Aſſignee and Aſſignees, will preſerve the Game as fair as it commonly hath been uſed, and that neither the ſaid Sir Maurice, nor any of the Heirs Males of his Body, nor any of their Aſſignees, will cut any manner of Wood growing upon any part of the Premiſſes, unleſs for neceſſary Brouſe, and ſuch as they may lawfully cut of their own, and as was accuſtomed, &c. after which Sir Maurice died, and Sir Henry Barkley his Son and Heir Male, cut four Oaks within the ſaid Walk called Brewicks, growing upon the Soil of the Queen there, every one of them being Timber, and of the value of 13 s. 4 d. and converted them to his own uſe. And whether by this Act done by the ſaid Sir Henry, the now Earl of Pembrok may re-enter into the things granted by him, was the Queſtion, which ſtands upon two Points, the firſt, Whether the laſt Proviſo makes a Condition, or be but a meer Covenant. 2. Whether this Act makes a Forfeiture of the ſaid Offices granted as before by the courſe of the Common Law.

Gawdy, Clench, Walmſley and Beamont, that the firſt Proviſo is not a Condition, either becauſe he is not by this to do more than he may do by his Superior Cuſtody, in which Caſe he ought to do it by his own Authority, as to take

take his Fee-Deer, or to chaſe and kill Deer by Warrnt, and the like; or otherwiſe if it ſhall be taken, that he may by this Proviſo kill or chaſe the Game at his pleaſure, it is void, becauſe as to it, he is to do that which he ought not to do by his Office, to wit, to deſtroy the Game, which by his Office he is to preſerve; and therefore for the firſt, it ſtands meerly upon the Covenant.

Then when he ſaith further in the ſecond Clauſe; Provided alſo, and the ſaid Sir Henry Barkley covenants, this is to be intended that it ſhall be as the other for the word alſo, and this is but a bare Covenant as the firſt was.

And they ſaid further, that this laſt Proviſo ſhall be ſaid entirely the words of the Grantee himſelf, as the Covenant is, and without words of the Grantor a Condition cannot be, for it is for him to condition with the Eſtate given, and not for him to whom the Grant is made; And therefore ſuppoſe that it had been on the other part, to wit, Provided always, and the Grantor covenant that the Grantee ſhall have the Refuſe of the Bruſh, and the like; this ſhall not be ſaid to be any Condition, but a meer Covenant: In like manner ſhall it be on the other part.

And further, it is common for Scriveners and ignorant Perſons to make in effect every Covenant to begin with a Proviſo in this manner, and therefore to expound ſuch a manner of Proviſo as a Condition, it ſhall be too perilous to the Eſtates of Men.

And for the Caſe upon the Leaſe made by Serjeant Bendloes, which was thus.

Provided always, and it was covenanted, granted and agreed between the Parties, if the Leſſee ſell or alien the Term, that the Leſſor ſhall have the Preferment, This they agreed to be a good Condition, as was adjudged in the Common Bench, 32 Eliz. but the Caſe there is, becauſe they are the words as well of the Leſſor, who may add a Condition to the Eſtate, as of the Leſſee who made the Covenant, which is not here. But they ſaid, that the Caſe between Hamington and Pepull which was 17 Eliz. in the King's Bench, was more nigh in reſemblance to the Caſe in queſtion, which was that the ſaid Pepull made a Leaſe for years to Hamington of a Farm, except the Wood; and covenanted with the Leſſee that he ſhall take all manner of Under-wood, provided always, and the Leſſee covenant that he will not cut any manner of Timber-tree, and this was adjudged no Condition. And as to the other Point they ſaid, that the cutting of Trees by him who had the Cuſtody of the Foreſt, is not a Forfeiture of his Office by the Common Law, as it is of him who hath the Cuſtody of a Park, for there is another ſpecial Officer who hath the Charge of Wood in a Foreſt, to wit, the Verderer and the Woodward, and therefore it is no Forfeiture of him who hath the Cuſtody of the Foreſt to cut Trees, for he hath another Charge, to wit, the Cuſtody of the Game only, and not of the Wood.

And further the cutting of one or two Trees is no cauſe of Forfeiture, for it may be that there is Covert-ſhade and Bruſh ſufficient of that which yet remains, in which Caſe it is no Forfeiture if it be not averred that theſe things are impaired by it.

But the Chief Juſtices, Chief Baron and all the other Juſtices and Barons were of a contrary Opinion. And for the matter of Forfeiture at Common Law, they ſaid that it was a cauſe of Forfeiture of an Office at Common Law to cut the Trees, as well in the Caſe of a Foreſter, as in the Caſe of a Park-keeper, for the Foreſter hath not only the Charge of the Game, but of all that is within the Foreſt by which the Game is fed, preſerved, or ſuccoured, and they are fed by the Bruſh, and ſuccoured by the Shade, and have the calmer and better Lodging by reaſon of the Trees; and therefore by their Office they are to have a care of theſe things as well as of the Game, for without theſe the Game cannot ſtand: as to ſay, that there are others who

have

have ſpecial Charge of the Wood and Paſture, as the Woodward, or Agiſter, this is no Proof that the Foreſters, or Keepers are diſcharged thereby.

And the Foreſters and Keepers are by their Offices to preſent the Miſdoers in the Woods within the Foreſts of the Woodwards, and therefore they have to do with it. And by Carta de foreſta, none may cut his Wood within his Foreſt, Niſi per viſum Foreſtarii, ergo the Foreſters have charge thereof: And every voluntary Act done by an Officer contrary to that which belongs to his Office is a Forfeiture of his Office, as by voluntary killing of Bucks, cutting of Trees, Wood, or the like: but otherwiſe it is of things done or ſuffered by his negligence if it be not common or often. And albeit the Trees here were not many, or that it was not averred that the Game was to be hurt thereby, yet it cannot be intended but that it is ſo much impaired by it, as it ſhould be by the killing of a Buck in the Foreſt, by which the Office ſhall be forfeited, becauſe the Game is thereby the worſe, and yet there may be Game ſufficient without this Buck, but he hath voluntarily done a thing contrary to his Office, and therefore it is a Forfeiture of his Office, and ſo it ſhall be in this Caſe.

And for the other Point they ſaid, it was a Condition and alſo a Covenant, and it was for good purpoſe to have it to be ſo: for ſuppoſe that the Game had been deſtroyed by the ſaid Sir Henry, ſhall this be a ſufficient Recompence or Satisfaction to enter for the Condition broken? No, and therefore the Covenant was made to recompence him for Damages.

When a Proviſo makes a Condition.

And when upon the Habendum a Proviſo is added for a thing to be done by him to whom the Deed is made, or to reſtrain him to do any thing, this is a Condition, as well as if it had been a Condition which ſhall make or ſhall reſtrain to do ſuch a thing, for they are in this Caſe the words of the Grantor, to reſtrain the Grant in ſome manner, and to ſhew in what manner he ſhall have it, and it is always to him who paſſeth the Eſtate, and to no other. Then ſuppoſe here, that the Proviſo had been; Provided always that the Grantee ſhall not cut any Tree, And the Grantee covenant alſo that he will not cut any Tree, this is plainly a Condition and alſo a Covenant; then it is as plain in the Caſe in queſtion, which is; Provided alſo, and the Grantee covenant, &c. that he will not cut any manner of Wood: diſtinguiſh the Sentence by his proper Diſtinction, and it is clear that it is a Condition as well as a Covenant. And to ſay, that there is a diverſity between this Caſe and that Caſe upon Serjeant Bendloe's Leaſe, becauſe there it is, Provided always, and it is covenanted and agreed between the Parties; In which Caſe it is alledged, that the Agreement which is the Plaintiffs, goes to the Proviſo to make it a Condition for him, as well as it ſhall go to the Grantee to make it to be a Covenant from him: they underſtand no difference, becauſe the Proviſe as it is placed, is of it ſelf as ſpoken by the Plaintiff; and the Agreement between the Parties that ſuch a thing ſhall be done by the Leſſee, makes it a Covenant on his part only, all being to be performed by him, as plainly as in the Caſe in queſtion.

And to ſay, that the laſt Proviſo ſhall not be a Condition, becauſe the firſt cannot enure as a Condition, becauſe that which is to be done may lawfully be done with it, or without it, or becauſe that the matter to which the Proviſo is annexed, is repugnant to the nature of the thing granted, yet this is not becauſe of the nature of the word it ſelf, but by reaſon of that to which the Proviſo is annexed, and therefore the Proviſo following hindred in its Operation by means of the word, alſo: And therefore if a Man makes a Leaſe for years, provided always that the Leſſor may enjoy and hold the Manors of D. (which is other Land) or that the Leſſee ſhall kill I.S. theſe are void Conditions; But grant then that it is further provided alſo that he ſhall not alien his Term, is not this a good Condition although that which was Precedent was no Condition? It is clear that it is not; and they ſaid for Hamington's Caſe

that

that it was but of the nature of a Declaration with what Wood the Leſſee ſhall meddle, becauſe it depends upon the Covenant of the Leſſor, and it is general, to wit, that he may cut any manner of Underwood, provided that he do not cut any manner of Timber; and Popham was of Council with Hamington in this Caſe, and the Court at the beginning inſiſted much that it was a Condition, and that for the reaſon then alledged, that it depended upon the Covenant of the Leſſor, which was general for all manner of Underwood, becauſe that Standels growing between great Trees, might be taken within the general words of all manner of Under-wood, for to make it plain it was well put in, that he ſhall not cut any manner of Timber-trees, and therefore in this Point it was but a Declaration, with what Wood he ſhould meddle, although in truth it was of another thing than was compriſed in the Covenant before: And then the adding of a Covenant to ſuch a Proviſo ſhall not make the Proviſo of another nature, than it was before the Covenant made, or if no Covenant had been added to it, and upon this reaſon the Court then gave Judgment for Hamington. And by him, if I am ſeiſed of the Manor of D. in D. and of Black Acre in D. and ſo ſeiſed, I covenant with I. S. that he ſhall enjoy the ſaid Manor for ten years: Provided and the ſaid I.C. covenant that he ſhall not enjoy Black Acre, this Covenant is not a Condition, but a Declaration deduced out of my Covenant, to make a plain Declaration, that it is not my intent that Black Acre ſhall paſs, be it parcel or not parcel of the ſaid Manor: then the Covenant following will not alter the nature of the Expoſition of the Proviſo which the Law ſhall make of it ſelf, if it had ſtood of it ſelf without a Covenant following.

And for the Proviſo here, he put this Caſe, ſuppoſe it had been; Provided, and the Grantee covenants that he ſhall not cut any Trees: None will deny but that this had been a Condition and a Covenant alſo: And what diverſity is there where the word is at the Concluſion, and ſo couple the Condition and Covenant together? And we are not to alter the Law for the ignorance of Scriveners, who do they know not what by their ignorance, ſhall be corrected by the Law.

And they agreed, that where a principal Officer is by his Office to make inferior Officers under him, and the inferior Officer commits a Forfeiture, the ſuperior Officer ſhall take advantage thereof, and ſhall place a new Officer, as was done in 39 H. 6. for the Office of the Marſhall of the King's Bench, put in by the great Marſhal of England.

Eaſter

Eaſter Term, 39 Eliz.

Overton *verſus* Sydall.

1. IN Debt between Valentine Overton Clark, Prebendary of the Prebend of Tervin in the County of Cheſter, founded in the Cathedral Church of Litchfield in the County of Stafford, againſt Thomas Sydall Executor of William Sydall, the Caſe appeared to be this.

Henry Sydall Clark, Prebendary of the Prebend, 26 Mali, 5 E. 6. with the Aſſent of the Dean and Chapter, and by Writing indented, demiſed the ſaid Prebend to the ſaid William Sydall for 43 years, from the Feaſt of the Annunciation of our Lady, in the year of our Lord 1555. at the yearly Rent of 36 l. William Sydall aſſigned over his Term, and died, making the ſaid Thomas his Executor, Henry Sydall alſo died, and afterwards the Plaintiff was made Prebend, and for the Rent Arrear in his time, and after the Aſſignment this Action is brought againſt the Executors in the Debet and Detinet.

And it was alledged that in Hillary Term, 36 Eliz. Rot. 420. in the Caſe between Glover and Humble, it was adjudged in the King's Bench, that the Grantee of the Reverſion ſhall not maintain an Action of Debt upon a Leaſe for years againſt the Leſſee himſelf, for any Arrears of Rent incurred, after that he had made an Aſſignment of his Term over to another, and alledged alſe that in Hillary, 29 Eliz. in a Caſe between it was adjudged, that an Action of Debt lieth for the Leſſor himſelf againſt the Leſſee, for Arrearages of Rent reſerved upon the Leaſe, and accrued after the Leſſee had aſſigned his Term over, and both theſe Caſes were adjudged accordingly in the King's Bench, and the reaſon in the firſt Caſe was, becauſe that by the Grant of the Reverſion over, the privity of Contract which was between the Leſſor and the Leſſee is diſſolved, and the Grantee of the Reverſion as to it but a Stranger.

But in the laſt Caſe the privity of Contract is not diſſolved between the Leſſor and the Leſſee, notwithſtanding the Leſſee hath paſſed over his Term, neither is the Contract thereby determined betwixt the Parties.

But Fennor ſaid, that in this Caſe the privity in Deed is gone by the death of the Leſſee, and therefore the Executor who is but privy in Law, is not ſubject to this Action, unleſs in caſe where he hath the Term; in which Caſe he ſhall be charged as he who hath Quid pro quo, which is not in the Caſe here.

And he ſaid further, that a Leaſe made by a Prebend is good no longer than his own life, but is meerly void by his death, and therefore ſhall not be ſaid to be a Contract to bind further than his life, and therefore alſo he ſaid, that the Action will not lie in the ſaid Caſe for the Succeſſor.

But Gawdy ſaid, that here the Leaſe is confirmed, and therefore good during the Term, but it ſeemed to him that the Executor who is but privy in Law ſhall not be chargeable with his Action for the Arrearages due after the Aſſignment over, and yet he agreed that the Heir, the Succeſſor, and the Executor of the Leſſor ſhall have Debt againſt the Leſſee himſelf, for the Arrearages which accrues to be due after the Aſſignment over of the Leaſe:

But

But he ſaid, that the Action of Debt againſt the Executor upon a Leaſe made to the Teſtator, and for the Arrearages due in the time of the Executor, ought to be in the Debet and Detinet, and that for the Occupation of the Term, whereby he hath Quid pro quo, which is not in this Caſe.

Popham ſaid, that for the time that the Contract ſhall bind in nature of a Contract, there is not any difference between the Heir the Succeſſor, and the Executor of the Leſſor, and the Executor or Adminiſtrator of the Leſſee, for the one and the other are equally privy to the Contract, and a Contract or Covenant eſpecially being by writing, binds as ſtrongly the Executor or Adminiſtrator, as the Teſtator or the Inteſtate himſelf who made it. For theſe are Privies indeed to the Contract, and as to it repreſent the Perſon of the Teſtator or Inteſtate himſelf.

And he agreed, that the Action of Debt againſt the Executors, for the Arrearages of Rent of a Leaſe which he occupies as Executor, and accrued in their own time, ſhall be in the Debet and Detinet; The reaſon is, although they have the Land as Executor, yet nothing thereof ſhall be employed to the Execution of the Will, but ſuch Profits which are above that which was to make the Rent, and therefore ſo much of the Profits as is to make, or anſwer the Rent, they ſhall take to their own uſe to anſwer the Rent, and therefore they having Quid pro quo, to wit, ſo much of the Profits for the Rent, the Action ought to be brought againſt them in ſuch Caſes, where they are to be charged in Debt for Rent upon a Leaſe made to the Teſtator, and have not the Profits of the Leaſe it ſelf, nor means, nor default in them to come to it, the Action of Debt ought to be againſt them in the Detinet only, and this is the Caſe here, and therefore the Action being in the Debet and Detinet, doth not lye.

And further he agreed in this Caſe to the Opinion of Fennor, that the Action here doth not lie for the Succeſſor of the Prebend who made the Leaſe, for no more than the Succeſſor in this Caſe ſhall be bound by the Contract of his Predeceſſor, no more ſhall he take advantage by this Contract, for it is the Conſideration which makes him to be bound, and not only the Contract, and ſo the Succeſſor in ſuch Caſes is but privy in Law, and not in Deed to the Contract of his Predeceſſor. But otherwiſe it is of the Succeſſor of a Biſhop and the like, which Leaſes are not void againſt the Succeſſor, but voidable.

Caſe of Armes.

2. UPon an Aſſembly of all the Juſtices and Barons at Sergeants-Inn, this Term, on Monday the 15th day of April, upon this Queſtion moved by Anderſon Chief Juſtice of the Common Bench: Whether Men may arm themſelves to ſuppreſs Riots, Rebellions, or to reſiſt Enemies, and to endeavour themſelves to ſuppreſs or reſiſt ſuch Diſturbers of the Peace, or Quiet of the Realm; and upon good deliberation, it was reſolved by them all, that every Juſtice of Peace, Sheriff, and other Miniſter, or other Subject of the King, where ſuch accident happen, may do it: And to fortifie this their Reſolution, they peruſed the Statute of 2 E. 3. cap. 3. which enacts that none be ſo hardy as to come with force, or bring force to any place in Affray of the Peace, nor to go or ride armed, night nor day, unleſs he be

Servant to the King in his presence, and the Ministers of the King in the Execution of his Precepts, or of their Office, and these who are in their company assisting them, or upon Cry made for Weapons to keep the Peace, and this in such places where accidents happen upon the Penalty in the same Statute contained; whereby it appeareth, that upon Cry made for Weapons to keep the Peace, every Man where such Accidents happen for breaking the Peace, may by the Law arm himself against such evil Doers to keep the Peace.

But they take it to be the more discreet way for every one in such a Case to attend and be assistant to the Justices, Sheriffs, or other Ministers of the King in the doing of it.

3. AT the same time it was also resolved by them all (except Walmsley, Fennor and Owen) in the Case of one Richard Bradshaw and Robert Burton, who with others lately by word entred themselves into an Agreement one with another to rise and put themselves into Arms, and so to go from one Gentleman's House to another, and so from House to House to pull down Inclosures generally; that this so appearing by their own Confession, or by two Witnesses according to the Statute, is High Treason by the Statute of 13 Eliz. cap. 1. The words of which Statute are, That if any intend to levy War against the Queen, and this maliciously, advisedly and expresly declare or utter by any words or sayings, that this shall be High Treason: For all agreed that Rebellion of Subjects against the Queen hath been always High Treason at the Common Law, for the Statute of 25 E. 3. cap. 1. is, that levying of War within the Realm against the King is Treason, and Rebellion is all the War which a Subject can make against the King.

Rebellion of Subjects High Treason.

But Walmsley and the others with him said, that the Statute of 1 Mar. cap. 12. 10. That if any to the number of twelve, or more, assemble themselves to the Intent to pull down Inclosures, Pales, and the like with force, and continuing together after Proclamation, according to the Statute, to go away by the space of an hour, or do any of the Offences mentioned in the Statute, that this is Felony: So that if these Actions had been Treason at the Common Law, it had been to no purpose to have made it Felony.

And it seemed to them that the Resistance ought to be with Force to the Queen, before that such Acts shall be said Treason.

But all the other Justices agreed (and so it was put in ure lately in the Case of the Apprentices of London) that if any assemble themselves with Force to alter the Laws, or to set a Price upon Victuals, or to lay violent hands upon the Magistrate, as upon the Mayor of London, and the like, and with Force attempt to put it in Action, that this is Rebellion and Treason at Common Law, and this Statute of 1 Mariæ, makes it in such a Case but Felony.

And they put a diversity between the Cases of pulling down Inclosures, Pales, &c. comprised in the Statute of 1 Mar. for those are to be understood where divers to the number of twelve, or more, pretending, any or all of them to be injured in particular, as by reason of their common, or other Interest in the Land inclosed, and the like, and assembling to pull it down forcibly, and not to the Cases where they have a general dislike to all manner of Inclosures, and therefore the assembling in a forcible manner, and with Arms to pull them down where they have any Interest, whereby they were in any particular

particular to be annoyed or grieved, is not Treason; but the Case here tending to a generality, makes the Act if it had been executed to be high Treason by the course of the Common Law.

And therefore the intention appearing as the Case is here, it is Treason by the Statute of 13. aforesaid.

Periam in some manner doubted of the principal Case, but to intend to rise with force to alter the Laws, to set Price upon any Victuals, or to use force against a Magistrate for executing his Office of Justice, and the like, he said that they were clearly Treason by the Statute of 13. aforesaid, if it may appear by express words, or otherwise, as the said Statute mentions, for all these tend against the Queen, her Crown and Dignity, and therefore shall be as against the Queen her self: And if it had been put in practice it had been Treason at the Common Law.

Here ends the Lord *POPHAM'S* REPORTS.

R 2 AN

Here ends the Second
REPORTS.

AN ADDITION Of certain Select Cases In the time of King JAMES, and King CHARLES the First.

Trin. 15 *Jac.* In the King's Bench, entred, *Hill. Jac. Rot.* 194.

Brooks *Case.*

IN an Ejectione firmæ brought by one Brook against Brook, the Case was thus.

John Wright a Copy-holder in Fee, to Eliz. surrendred his Land into the hands of the Lord by the hands of Tenants, according to the Custom, &c. without saying, to whose Use the Surrender should be; And at the next Court the said John Wright was admitted Habendum to him and his Wife in Tail, the Remainder to the right Heirs of John Wright, and the Wife of John Wright now Defendant was seised from the time of the Admittance until this day: And it was objected by the Council of the Plaintiff, that the Surrender was void, because no Use was limited, and therefore by Constitution of Law ought to be to the Use of the Surrender, as if a Feoffment be made and no Use limited, it shall be to the Use of the Feoffor, or as it is in Sir Edward Clere's Case, Coke, lib. 6. 18. If a Feoffment be made by one to the Use of his last Will, he hath the Use in the mean time.

Where upon Surrender of Copy-hold Land no Use is limited, to whose use it shall be.

2. That the Admittance was not available to pass an Estate to the Wife, for she was not named in the Premisses, but only in the Habendum, and the Office of an Habendum is to limit the Estate and not the Person, and therefore it is said in Throgmorton and Tracie's Case in Plowd. Com. That if one be named to take an Estate in the Habendum, where he was not named at all in the Premisses, this is not good.

But it was resolved by the whole Court for the first Point, that the subsequent Act shall explain the Surrender, for, Quando abest Provisio partis, adest provisio legis: And when the Copy-holder accepts a new Admittance, the Law intends that the Surrender generally made was to such an Use, as is specified in the Admittance, and the Lord is only as an Instrument to convey the Estate, and as it were put in trust to make such an Admittance, as he who surrenders would have him to make: And Crook Justice said, Fides adhibita fidem obligat.

For

For the ſecond Point it was alſo agreed by the Court that the Wife ſhall take by this Admittance, albeit ſhe were not named in the Premiſſes, but only in the Habendum; and they agreed, that in Feoffments and Grants, the Party that is not named in the Premiſſes ſhall not take by the Habendum: and therefore Throgmorton and Tracy's Caſe (as to this point) is good Law; But this Caſe of a Copy-hold is like to the Caſe of a Wife, or to the Caſe of Frank-marriage, in which it is ſufficient to paſs an Eſtate, albeit the Party be only named in the Habendum, and if it ſhould be otherwiſe the Eſtates of many Copy-holders would be ſubverted: And ſo they reſolved that Judgment ſhould be given for the Defendant.

The ſame Term in the ſame Court.

Laurking *and* Wilde's *Caſe.*

Tithes for a riding Nag.

THE Rector of the Church of libelled in the Spiritual Court, for the Tithes of a riding Nag, where the Caſe was; That a Man let his Land, reſerving the running of an Horſe at ſome time, when he had occaſion to uſe him there: The Defendant ſhewed this matter in the Court by his Councel, and prayed a Prohibition, and avers, that for the ſame Land in which the Horſe went he paid Tithes. And by the Court, nigh London, a Man will take an 100 or 200 Horſes to Grais, now he ſhall pay Tithes for them, or otherwiſe the Parſon ſhall be defeated. But in this Caſe, if the Defendant alledge and prove that it was a Nag for labour, and not for profit, a Prohibition lies.

The ſame Term in the ſame Court.

Havergall *verſus* Hare.

Afterwards, *fol.* 55.

IF an Ejectione firmæ brought by Havergall againſt Hare, the Caſe was thus. A Rent of 20 l. per annum was granted out of Glen-Acre to one and his Heirs, to be paid at Michaelmas, and the Annunciation of our Lady, by equal portions, and the Grantor covenants, that if the Rent of 20 l. be arrear by the ſpace of twenty days, that the Grantee may diſtrain, and that if there be not ſufficient Diſtreſs upon the Land, or if there be a Reſcous Replevin, or Pound-breach, that then it ſhall be lawful for the Grantee and his Heirs to enter and retain the Land to them and their Heirs, until the 20 l. be paid, 10 l. for one half years Rent was in Arrear, and for it an Entry was made.

Part 147

Mountague Chief Juſtice, and Doderidge Juſtice, there can be no Entry made when 10 l. only is behind, for the words of the Deed are, that if the Rent of 20 l. be behind, that the Grantee and his Heirs may enter, and if he ſhall enter now he ſhall retain the Land for ever, for the 20 l. ſhall never be paid.

Crook and Haughton Juſtices, contrary, for if 10 l. be Arrear, the Rent of 20 l. is Arrear; for Haughton ſaid, in an Aſſiſe of Rent of 40 l. where part is Arrear, yet he ought to bring his Aſſiſe for the whole Rent of 40 l. for the Writ ought to agree with the Deed.

Doderidge agreed with him in the Caſe of an Aſſiſe, but not in the principal Point.

And

And for the ſecond Point it was agreed by them all, that upon the Entry of the Grantee, he ſhall have a Fee-ſimple determinable, admitting the Entry for the 10 l. to be good.

The ſame Term in the ſame Court, and it is entred, 14 Jac. Rot. 1484.

Robinſon *verſus* Walter.

RObinſon brought an Action of Trover and Converſion againſt Walter, and upon the whole matter the Caſe appeared to be this.

A Stranger took the Horſe of the Plaintiff, and ſent him to a common Inn, and there he remained for the ſpace of half a year, at which time the Plaintiff had notice where his Horſe was, and thereupon he demanded him of the Inn-keeper, who anſwered that a perſon unknown left the Horſe with him, and ſaid, that he would not deliver the Horſe to the Plaintiff unleſs he would pay for his Meat, which came to 3 l. 10 s. for all the time, and alſo would prove that it was his Horſe, upon which the Plaintiff demurred in Law.

And it was reſolved by Mountague Chief Juſtice, Crook and Dodderidge, Juſtices (Haughton Juſtice diſſenting) that the Defendants Plea was good, for the Inn-keeper was compellable to keep the Horſe, and not bound at his peril to take notice of the owner of the Horſe. And by the Cuſtom of London, if an Horſe be brought to a common Inn, where he hath (as it is commonly ſaid) eaten out his Head, it is lawful for the Inn-keeper to ſell him, which Caſe of the Cuſtom implies this Caſe. And there is a difference where the Law compels a Man to do a thing, and where not; As if the Lieutenant of the Tower brings an Action of Debt for Diet againſt one who was his Priſoner, in this Caſe the Defendant cannot wage his Law, becauſe the Law compels the Lieutenant to give Victuals to his Priſoner, otherwiſe if another Man brings an Action of Debt for Diet, and in the Caſe at the Bar the Inn-keeper was compellable. And Doderidge ſaid, that if the Law were as the Plaintiff would have it, it were a pretty trick for one who wants a Keeping for his Horſe. And Mich. 6 Jac. in the King's Bench, between Harlo and Ward, the like was reſolved as was cited by Barkeſdels of Council with the Defendant.

An Inn-keeper may detain an Horſe until he be ſatisfied for Meat, albeit he be left by a Stranger.

Mich. 14 *Jac.* In the *King's Bench.*

Rawlinſon *verſus* Green.

A Copy-holder ſurrendred out of Court, according to the cuſtom of the Manor, which at the next Court was preſented, and Entry thereof made by the Steward, Scilicet, Compertum eſt per homagium, &c. but no admittance: Afterwards Ceſtuy que uſe ſurrenders before Admittance, and the firſt Copy-holder ſurrenders to the Plaintiff: And in this Caſe there were two Queſtions.

1. Whether he may ſurrender before Admittance;
2. Who ſhall have the Land; whether the firſt Copy-holder, or the Lord; Haughton Juſtice held that he could not ſurrender before Admittance, and the

A Surrender of Copy-hold cannot ſurrender before admittance.

the Entry of the Surrender doth not make an Admittance, for this being the ſole Act of the Steward, ſhall not bind the Lord, and it is not like to the uſual form of an Admittance, for that is, Dat Domino de fine fecit fidelitatem & admiſſus eſt inde tenens. Doderidge Juſtice agreed and ſaid, that in Hare and Brickley's Caſe, the Admittance of a Copy-holder was compared to the Induction to a Benefice which gives the Poſſeſſion.

Hillary, 14 *Jac.* In the *King's Bench.*

Sir John Pool's *Caſe.*

THree Executors brought an Action of Debt, and one only declared, and they were ready for a Tryal in the Country, and now it was moved that the Declaration might be amended, and the names of the other Executors inſerted: but per Curiam this cannot be without the Aſſent of the Parties.

Paſch. 15 *Jac.* In the *King's Bench.*

Cooper *verſus* Smith.

Action for theſe words *Thou haſt killed thy Maſter's* Cook.

AN Action upon the Caſe was brought for theſe words; viz. Waterman, and thou (Innuendo the Plaintiff) haſt killed thy Maſter's Cook Innuendo, &c. and I will bring thee in queſtion for thy Life: And after Verdict for the Plaintiff, it was moved in Arreſt of Judgment by the Council of the Defendant, that the words were not Actionable for the incertainty, inaſmuch as it doth not appear who was his Maſter, nor that his Maſter had a Cook.

Innuendo cannot make a thing that is uncertain certain.

Mountague Chief Juſtice ſaid, that the words were Actionable, and albeit an Innuendo cannot make a thing that is uncertain certain, but ſhall ſerve as a Predict, yet the words import that he had a Maſter, and that his Maſter had a Cook, to which all the Court agreed, and Judgment was given for the Plaintiff.

Thou haſt ſacrificed thy Child to the Devil.

And another Action was brought for theſe words, ſcil. Thou haſt ſacrificed thy Child to the Devil; and adjudged that the words were Actionable.

Mich. 15 *Jac.* In the *King's Bench.*

Lee *verſus* Brown.

Whether Copy-hold Lands may be intailed.

IN an Ejectione firmæ brought by Lee againſt Brown, the Caſe was this. Tenant in Tail of Copy-hold Land ſurrendred the ſame into the hands of the Lord, to the uſe of J. S. whereupon two Points did ariſe. 1. Whether Copy-hold Land be within the Statute of Donis conditionalibus, ſo that it may be intailed. 2. Whether the Intail may be cut off by the Surrender.

Doderidge Juſtice ſaid, as to the firſt Point, that it hath been a great Doubt, whether it may be intailed, but the common and better Opinion was, that by the ſame Statute co-operating with the cuſtom it may be intailed, and with this

this agrees Heydon's Case in my Lord Coke's 3d Report, and so was the Opinion of the Court.

An Intail of Copy-hold Land not to be cut off by Surrender, unless by special Custom.

And for the second Point, their Opinion also was, that it could not be cut off by Surrender, unless it were by special Custom, and they directed the Jury accordingly: And it was said to maintain this Custom, it ought to be shewn that a Formedon had been brought upon such a Surrender, and Judgment given that it doth not lie; yet it was agreed that it was a strong proof of the Custom, that they to whose use such Surrenders had been made, had enjoyed the Land against the Issues in Tail: And it was said by the Council of the Defendant, that there was a Verdict for them before in the same Case, which they could prove by Witnesses, but the Court would not allow such a Proof, because it was matter of Record, which ought to be shewn forth.

In the same Term in the Common Pleas.

May *versus* Kett.

Words. *Thou hast stoln my Corn out of my Barn.*

AN Action upon the Case was brought for these words; viz. Thou hast stoln my Corn out of my Barn; And it was moved in Arrest of Judgment, because he had not said how much he had stollen, and perhaps it was of small value: and yet it was adjudged that the Action would lie, for it is at least petit Larceny: But if he had said, that he had stoln his Corn generally, it had not been Actionable, for it might have been growing, and then it had been but a Trespass.

The same Term in the Star-Chamber.

Riman *versus* Bickley, *and others.*

JOhn Riman exhibited a Bill in the Star-Chamber, against Thomas Bickley, and Anne his Wife, Dr. Thorn, Mr. Goulding, and others Defendants, the said Anne was first married to Devenish Riman the Plaintiffs Son, and between them were many jars and disagreements, and the said Devenish was much given to drinking, and other Vices, and divers times did beat and abuse his Wife, and was also jealous of the said Thomas Bickley, and his Wife being at a certain time at Supper with Doctor Thorn, Goulding, and others, spake such words as these (having Communication that her Husband did beat and abuse her) to wit, That she heard that his Father had that quality, and being once whip'd for it, was the better ever after, and that if she thought it would do her Husband any good, she would willingly bestow 40 s. on some body to give him a whipping, whereupon Goulding said, that he would give him a Medecine for his Malady, and within two days after he came in the night in Womans Apparel with a Weapon under his Cloak, and with a Rod, and went into the House and Chamber of the said Devenish, and would have whipped him, and in striving together, there was some hurt done on either side, but Goulding not being able to effect his purpose, fled, and this was conceived to be by the procurement of Anne his Wife: And not long after Devenish fell sick, and sent to his said Wife for certain Necessaries, which she would not send him, and presently after Devenish died, and she refused to come to his Burial.

And although it were much diſliked that Deveniſh ſhould abuſe his Wife in ſuch uncivil manner, as to ſtrike and beat her, and (as Coke late Chief Juſtice ſaid) it is not lawful by the Act Military for one Man to ſtrike another in the preſence of Ladies, yet it was reſolved by the whole Court, that it was a great Miſdemeanor in the Wife, and uncivil and undutiful Carriage in her to do ſo to her Husband, as they uſe to do to Children or Fools, to wit, to give them the Whip, and ſo to diſgrace and take away the good Name of her Husband, which, viz. a Man's good Name and his Childrens, are the two things which make a Man live to Poſterity; as was ſaid by Sir Francis Bacon Lord Keeper: and the Court fined the Wife 500 l. and it was ſaid, that Thomas Bickley her now Husband well deſerved to pay this Fine, becauſe he was too familiar with her in the time of his Predeceſſor, and as the Biſhop of London ſaid, Deveniſh Riman lay upon her hands, and Thomas Bickley upon her heart: and to aggravate this matter, a Letter was ſhewn which Deveniſh Riman wrote to his Wife, in which he called her Whor, and told her ſomewhat roundly of her faults, and ſhe wrote back to him in the Margin, that he lyed, and wiſhed him to get a better Scribe for his next Letter, for he was a Fool that wrote that, wherein ſhe called him Fool by craft: And Goulding's Offence was accounted the greater, becauſe he was a Miniſter, ſo that he was fined 500 l. alſo: And Coke ſaid, that the courſe of this Court was that if any were fined who is not able to pay it Reſpondeat ſuperior, he that is the principal and chief Agent therein muſt anſwer it, for otherwiſe poor Men might be made Inſtruments of great Miſchief, who are not able to anſwer, and the greater Offenders ſhall eſcape, which the Lord Keeper confirmed. And as to Doctor Thom, he was acquitted by all: And the Biſhop of London ſaid, that they had thought to have troad upon a Thorn, and they gat a Thorn in their foot: And by Coke, if Deveniſh Riman had died upon it, it had been capital in the Wife who procured it, for it was an unlawful Act.

The ſame Term in the King's Bench.

Weſcot *verſus* Cotton.

Where an Infant Executor may declare by Attorney, but not defend by Attorney, but by Guardian.

THE Caſe was this, An Infant Executor upon an Action brought againſt him appeared by Attorney, where he ought to appear by Guardian, and it was reſolved by the Court that this was Error, for this doth much concern the Infant, in as much as by his falſe Plea he ſhall be bound to anſwer of his own Goods, if he hath no Goods of his Teſtator, and therefore in 11 E. 4. 1. he hath Remedy againſt his Guardian for pleading a falſe Plea.

And by Doderidge, if he hath no Guardian, the Court ſhall appoint him a Guardian. And if an Infant bring an Action as Executor by Attorney, and hath Judgment to recover, this is not erroneous, becauſe it is for his benefit; ſo per Curiam, the difference is where he is Plaintiff, and where he is Defendant: And there is another difference where he is Executor, and where not, for being Executor, his Plea might have been more prejudicial to him, and Coke, lib. 5. Ruſſel's Caſe was agreed for good Law, for an Infant may be Executor, and may take Money for a Debt, and make a Releaſe and give an Acquittance, but not without a true Conſideration and Payment of the Money.

The

The ſame Term in the ſame Court.

Thomas Middleton's *Caſe.*

THomas Middleton, alias Strickland was condemned for a Robbery at the Aſſiſes in Oxford, after which he made an Eſcape, and being taken again he was brought to the Bar, and upon his own Confeſſion that he was the ſame Party who did the Robbery, and that he was condemned for it, the Court awarded Execution: And Mountague Chief Juſtice ſaid, that was no new Caſe, for it had been in Experience in the time of E. 3. and 9 H. 4. and 5 E. 4. that the Court might ſo do upon his own Confeſſion: And becauſe the Sheriff of Middleſex did not give his Attendance upon the Court in this Caſe, nor came when he was called, the Court fined him 10 l. And Montague ſaid, that it ſhall be levied by Proceſs out of the Court, and alſo all other Fines there aſſeſſed and not eſtreated into the Exchequer, for then the Party might compound for a matter of 20 s. and ſo the King be deceived.

Where a Felon is condemned, and eſcapeth, and is retaken, upon Confeſſion that he is the ſame Party, Execution may be awarded.

The Sheriff of *Middleſex* fined for not attending the Court.

The ſame Term in the ſame Court.

Gouldwell's *Caſe.*

JOhn Gouldwell ſeiſed of Land in Socage Tenure deviſed them to his Wife for life, the Remainder to John Gouldwell his Son and his Heirs, upon Condition that after the death of his Wife he ſhall grant a Rent-charge to Steven Gouldwell and his Heirs, and if John Gouldwell die without Heirs of his Body, that the Land ſhall remain to Stephen Gouldwell in Tail; the Wife dieth, John Gouldwell grants the Rent accordingly, Stephen Gouldwell grants the Rent over: John Gouldwell dies without Heir of his Body, and the ſecond Grantee diſtrains for the Rent Arrear, and Stephen Gouldwell brings a Replevin: And it was urged by the Council for the Plaintiff that this Rent ſhall not have Continuance longer than the particular Eſtate, and cited 11 H. 7. 21. Edrick's Caſe, that if Tenant in Tail acknowledge a Statute this ſhall continue but during his life: and Dyer 48. 212. But it was agreed per Curiam that the Grantee was in by the Deviſor, and not by the Tenant in Tail, and therefore the Grant may endure for ever.

But for the ſecond Point, this being to him in Remainder, the intent of the Deviſor is thereby explained that he ſhall have the Rent only until the Remainder come in Poſſeſſion, for now the Rent ſhall be drowned in the Land by Unity of Poſſeſſion.

3. It was agreed and reſolved, that by the granting of the Rent over this was a Confirmation. And Mountague ſaid, that it was a Confirmation during the Eſtate Tail, and ſhall enure as a new Grant afterwards: And Haughton and Doderidge ſaid, that they would not take benefit of the Grant over by way of Confirmation, for as Haughton ſaid, this enures only ought of the Deviſor, and he hath power to charge the Land in what manner he pleaſeth, and it is like to an uſual Caſe, as if a Man makes a Feoffment in Fee to the uſe of one for life, the Remainder over, with power to make Leaſes, and after he makes a Leaſe, this is good againſt Tenant for life, and him in the Remainder alſo: And I have conſidered what the intent of the Deviſor ſhould be in granting of this Rent, and it ſeems to me, that in as much as the Land is limited in Tail, and the Rent in Fee, that by this the Grantee ſhall have power to grant or diſpoſe of the Rent in what manner he would:

but if the Land had been in Fee, I should have construed his intent to have been, that the Grantee should have the Rent only until the Remainder fall; to which Doderidge agreed, who said, that we are in the Case of a Will, and this Construction stands with the intent of the Devisor, and stands with the Statute, which says, Quod voluntas Donatoris est observanda.

The same Term in the same Court.

Baskervill *versus* Brock.

Difference between Bail in the King's Bench and the Common Pleas. And how a Bail shall relate

A Man became Bail for another upon a Latitat in the King's Bench, and before Judgment, the Bail let his Lands for valuable Consideration: And afterwards Judgment was given for the Plaintiff. And now it was debated, whether the Land Leased shall be liable to the Bailment: and it was said by Glanvill of Council with the Lessee, that it ought not to be liable, and he put a difference between a Bailment in this Court, and a Bailment in the Common Pleas, for there the Suit cometh by Original, and the Certainty of the Debt or Demand appeareth in the Declaration, and therefore then it is certainly known from the beginning of the Bailment for what the Bail shall be bound: But in this Court upon the Latitat, there is not any certainty until Judgment given, before which the Land is not bound, and now it is in another Man's hands, and therefore not liable, and he put Hoe's Case, Co. lib. 5. 70. where it was resolved that where the Plaintiff releaseth to the Bail of the Defendant upon a Suit in the King's Bench, before Judgment, all Actions, Duties and Demands, that this Release shall not bar the Plaintiff, for there is not any certain Duty by the Bail before Judgment, and therefore it cannot be a Release, and he cited the Case of 21 E. 3. 32. upon an Account, and said that it was like to a second Judgment, in that which reduceth all to a certainty, and therefore, &c.

But it was said by Mountague and Crook, that the Lessee shall be bound, for otherwise many Bailments and Judgments shall be defeated, which will bring a great Inconvenience: And Mountague said, that it was like to the Case of a Bargain and Sale of Land, which after it is enrolled, within six Months shall relate to the beginning of the Bargain, so upon the Judgment given, relation is made from the time of the Bailment. But Haughton being contra, therefore Curia advisare vult.

The same Term in the same Court.

The Earl of Shrewsbury's *Case.*

In the discretion of the Chief Justice to allow a Writ of Error.

The Entry of a Judgment how it shall relate.

Upon a Verdict, a Rule was given to have Judgment, and this was upon the Thursday, and upon Saturday after the Party that was Plaintiff died, and it was moved to have a Writ of Error, because it was said, that the Party died before Judgment, in as much as of course after the Verdict, and the Rule given for Judgment, there are four days given to speak in Arrest of Judgment; and so as Yelverton Attorney-general said, he died before Judgment absolutely given: and he moved the Court to have a Supersedeas: And it was agreed that it was in the discretion of the Chief Justice, Ex Officio, to allow a Writ of Error, but because it was a Cause of great consequence, he took the Advice of the Court, and it was agreed that a Writ of Error was a Supersedeas in it self, yet it is good to have a Supersedeas also; and if the Writ of Error had been allowed, the Court could not deny the Party

by a Superſedeas: But becauſe the Writ of Error was not allowed, and alſo becauſe no Error appeared to the Court, for where Judgment is entred, this ſhall relate to the time of the Rule given: It was reſolved that no Writ of Error ſhould be allowed, nor any Superſedeas granted.

The ſame Term in the ſame Court.

Rone's *Caſe.*

IN an Ejectione firmæ brought by the Leſſee of Rone, Incumbent of the Church of Dallinghoe in Com. Suff. It was found by Special Verdict, that the King was the true Patron, and that Wingfield entred a Caveat, in vita Incumbentis, he then lying in Extremis, ſcilicet, Caveat Epiſcopus ne quis admittatur, &c. Niſi Convocatus, the ſaid Wingfeild; the Incumbent dies, Naunton a Stranger preſents one Morgan, who is admitted and inſtituted, afterwards the ſaid Wingfeild preſents one Glover, who is inſtituted and inducted, and afterwards the ſaid Rone procured a Preſentation from the King, who was inſtituted and inducted, and then it came in queſtion in the Spiritual Court who had the beſt Right, and there Sentence was given that the firſt Inſtitution was Irrita vacua & inanis, by reaſon of the Caveat, and then the Church being full of the ſecond Incumbent, the King was put out of Poſſeſſion, and ſo his Preſentment void: But it was adjudged and reſolved by all the Court for Rone, for 1. It was reſolved that this Caveat was void, becauſe it was in the life of the Incumbent. 2. The Church upon the Inſtitution of Morgan was full againſt all but the King, and ſo agreed many times in the Books, and then the Preſentation of Glover was void by reaſon of the Super-inſtitution, and therefore no obſtacle in the way to hinder the Preſentation of Rone, and therefore Rone had good Right: And if the ſecond Inſtitution be void, the Sentence cannot make it good, for the Spiritual Court ought to take notice of the Common Law, which ſaith, that Eccleſia eſt plena & conſulta, upon the Inſtitution, and the Parſon hath thereby Curam animarum. And as Doderidge Juſtice ſaid, he hath by it Officium, but Beneficium comes by the Induction: and although by the Spiritual Law the Inſtitution may be diſannulled by Sentence, yet as Linwood ſaith, Aliter eſt in Anglia, who is an Author very well approved of amongſt the Civilians: And Doderidge put a Caſe out of Doctor and Student, the ſecond Book: if a Man deviſe a ſum of Money to be paid to I.S. when he cometh to full Age, and afterwards he ſues for it in the Spiritual Court, they ought to take notice of the time of full Age, as it is uſed by the Common Law, to wit, 21. and not of the time of full Age as it is uſed amongſt them, to wit, 25. So in this Caſe at the Bar, for when theſe two Laws met together, the Common Law ought to be preferred: And when the Parſon hath Inſtitution, the Arch-deacon ought to give him Induction: And ſee Dyer 293. Bedingfeild's Caſe cited by Haughton to accord with this Caſe.

The ſame Term in the ſame Court.

Taylor's *Caſe.*

JOhn Taylor a Citizen and Alderman of Gloceſter, was put out of his place by the Common Council of the City, for ſome Miſdemeanor, and he ſued out a Writ

Writ of Reſtitution for an Alderman's place.

a Writ of Reſtitution, and for that the cauſe of his diſplacing was not ſufficient his Writ was allowed, by reaſon whereof the other Alderman who was elected in his place was to be removed, for the number of Aldermen was full But Hazard another Alderman, to the end that the new Elect (who now was Mayor) ſhould not be diſplaced, was contented to ſurrender his Place in conſideration of 10l. a year granted to him by the Corporation for term of his life, with which the Wife of Hazard was not content, and therefore he would have left his Agrément: and thereupon the queſtion was, whether he might ſurrender, or not: And it was ſaid by Coventree Sollicitor, that he cannot; and he cited Middlecot's Caſe an Alderman of B. where the Opinion of the Court was, 13 Eliz. that he cannot ſurrender: Doderidge, perhaps they would not except his Surrender: Mountague ſaid, that Alderman Martin of London gave up his Alderman's place, and without queſtion any Man in ſuch a Caſe may ſurrender or leave his place, to which the Court agréed, and therefore it was ordered that Hazard ſhall have his 10l. a year, and that he ſhall ſtand to his firſt Agrément.

The ſame Term in the ſame Court.

May *and* Samuel's *Caſe.*

AN Action of Debt was brought upon an Obligation, the Condition whereof was to ſtand to the Arbitrement of John S. concerning all matters betwéen them to the time of the Submiſſion, who arbitrates that the one ſhall pay 20 s. and that the other ſhall make a general Releaſe to him of all matters, from the beginning of the World to the time of the Arbitrement.

Arbitrement.

Haughton Juſtice, this is an Arbitrement but of one part, and therefore void, but if it had béen only that the one ſhall pay 20 s. it may be good, for it ſhall be intended that the other by reaſonable Conſtruction ſhall be diſcharged or acquitted, to which Crook and Doderidge Juſtices agréed. But by Mountague Chief Juſtice, it ought to be ſpecified; yet they all agréed, and ſo it was adjudged that this was a void Arbitrement, for it was of the one part only, to wit, that he ſhall pay 20 s. for the other part for the Releaſe to the time of the Arbitrement was not within the Submiſſion; ſo if the Arbitrement had béen, that the one ſhall make a Releaſe, or ſhall be diſcharged or acquitted without ſpeaking of the other, this being on the one part only is a void Arbitrement, vide Coke, lib. 8. Baſpole's Caſe, and 7 H. 6. 40. accordingly.

The ſame Term in the ſame Court.

Vaughan's *Caſe.*

THomas Dedham had to Apprentice one Holland, who got his Maid with Child, and afterwards departed from his Maſter's Service, and ſtaid a whole night with Vaughan his Kinſman, and Dedham procured a Warrant from Sir Stephen Soame a Juſtice of Peace, that the Conſtable ſhould bring the ſaid Apprentice to order according to Law, and becauſe that Vaughan perſuaded him to withdraw himſelf, ſo that he ſhould not be taken by virtue of the Warrant, he was indicted.

And it was agréed that it was lawful for Vaughan to lodge and relieve him, albeit he knew his miſ-déeds, they being no Treaſon or Felony: But

Haughton

Haughton Justice took exception to the Indictment, because no place appeared where he perswaded him to withdraw himself from the Warrant, or in truth that he did hide himself from the Warrant, for if he did not so, the perswasion was nothing.

And Doderidge took another exception to the Warrant, because the Statute saith that two Justices, of which one of them shall be of the Quorum, shall proceed in such Cases against the Malefactor, and that they shall compel the Party to allow means for the Education of the Infant, or otherwise the Offender shall suffer Corporal Punishment, and so this Warrant not being special according.

Pasch. 16 *Jac.* In the *Star-Chamber.*

Wrennum's *Case.*

SIR Henry Yelverton Attorney-general, exhibited an Information in the Star-Chamber, against one Wrennum, Ore tenus, because he had divers times petitioned the King against Sir Francis Bacon Lord Chancellor, pretending that the said Lord Bacon had done great Injustice to him, in granting an Injunction, and awarding Possession of Land against him, for which he had two Decrées in the time of the former Chancellor: And also he made a Book of all the Procéedings in the said Cause betwéen him and one Fisher, and dedicated and delivered it to the King, in which he notoriously traduceth and scandalizeth the said Chancellor, saying, that for his unjust Decrée, he, his Wife and Children were murthered, and by the worst kind of death, by starving: And that now he having done unjustly, he must maintain it by speaking Untruths, and that he must use his Authority, Wit, Art and Eloquence, for the better maintenance thereof, with other such like scandalous words: And the Attorney cited a President, 2 Jac. where one Ford for an Offence in the like manner against the late Chancellor was censured in this Court, that he should be perpetually imprisoned, and pay the Fine of 1000 l. and that he should ride upon an Horse with his Face to the Tail, from the Fleet to Westminster, with his Fault written upon his Head, and that he should acknowledge his Offence in all the Courts at Westminster, and that he should stand there a reasonable time upon the Pillory, and that one of his Ears shall be cut off, and from thence shall be carried to Prison again, and in the like manner should go to Cheapside, and should have his other Ear cut off, &c. And because they conceived that the said Wrennum had wronged the said Lord Chancellor in the said Suggestion, they all agréed in his Censure according to the said President: Sée for such matter, 19 Ass. 5. 9 H. 8. Sir Rowland Heyward's Case, and 21 H. 8. Cardinal Wolsey's Case.

The same Term in the King's Bench.

Mingie's *Case.*

A Writ of Annuity was brought by Mingy, which was granted, pro Consilio impenso & impendendo, the Defendant pleaded in Bar that he carried a Bill to the Plaintiff, to have him set his Hand to it, and because he refused he detained the said Annuity: And per Curiam this is no Plea, for he is

Annuity *pro Consil. impenso, &c.*

Postea p. 204.

is bound to give Advice, but not to ſet his Hand to every Bill, for this may be inconvenient to him.

The ſame Term in the ſame Court.

THE Caſe was this, A Leſſee for years was bound in a Bond to give up the Poſſeſſion of the Land demiſed to the Leſſor, or his Aſſigns, at the end of the Term, the Leſſor aſſigns over his Intereſt, and the Aſſignee requires the Leſſee to perform the Condition, who anſwers, that he knew not whether he were the Aſſignee, and thereupon refuſeth: And the queſtion was, whether he had broken the Condition, and it was adjudged that he had, for he hath taken upon him ſo to do, and it is not like a Condition annexed to an Eſtate, as Coke, lib. 5. Mallorie's Caſe, or Coke, lib. 6. Green's Caſe, where the Patron preſented his Clerk to a Deprivation, yet the Ordinary ought to give the Patron notice of the Deprivation; for it is a thing Spiritual, of which a Lay-man ſhall not be bound to take notice.

Notice where requiſite.

Deodand. It was moved, that a Man riding upon an Horſe through the Water was drowned, and by the Coroners Inqueſt it was found that his death was cauſed Per curſum aquæ, and the Horſe was not found a Deodand, and per Curiam they did well, for the Water, and not the Horſe was the cauſe of his death.

The ſame Term in the ſame Court.

Wooton *verſus* Bye.

THE Caſe was this: A Man made a Leaſe for years, rendring Rent, and upon Payment of the Rent the Leſſor made an Acquittance, by a Releaſe of all Actions, Duties and Demands, from the beginning of the World to the day of the date: And whether the Rent to come were releaſed by it, was the queſtion: And it was moved by Crook at the Bar, that it was not, for a Covenant in future ſhall not be releaſed by ſuch words, yet a Releaſe of all Covenants will be good in ſuch a Caſe, as the Book is in Dyer 57. ſo Hoe's Caſe, Coke, lib. 5. 70. b. ſuch a Releaſe will not diſcharge a Bail before Judgment. But it was anſwered and reſolved by the Court, that ſuch a Releaſe will diſcharge the Rent to come, for this word (demand) is the moſt large and ample word in a Releaſe that may be, as Littleton ſaith, and in Coke, lib. 8. Altham's Caſe, and in Hoe's Caſe, Coke, lib. 5. one was Bail for the Defendant, the words whereof are conditionable, Scil. Si contigerit predict. defendent. debita & damna illa prefat. Quer. minime ſolvere, &c. So that before Judgment it is altogether uncertain, and therefore cannot be releaſed, but in the Caſe at the Bar he hath Jus ad rem, though not in re, as Crook Juſtice ſaid.

Releaſe of all Demands bars a future Rent.

The ſame Term in the ſame Court.

Bret *verſus* Cumberland.

IN a Writ of Covenant the Caſe was thus: Queen Elizabeth by her Letters Patents made a Leaſe of certain Mills, rendring Rent, in which Leaſe were

were theſe words, to wit, That the ſaid Leſſee his Executors, Adminiſtrators and Aſſigns, ſhould from time to time repair the Mills, and ſo leave them at the end of the Term, the Leſſee aſſigns over his Term, the Queen alſo grants over the Reverſion, the firſt Leſſee dies, and the Grantee of the Reverſion brings a Writ of Covenant againſt his Executors; In which Caſe there were two Points. 1. Whether theſe words, And the ſaid Leſſee, his Executors, Adminiſtrators and Aſſigns, ſhall from time to time, &c. make a Covenant, or no. 2. Whether (as this Caſe is) it will lie againſt the Executors of the Leſſee.

Whether Covenant lies againſt the Executor of a Leſſee after Aſſignment.

As to the firſt Point it was agreed that it is a Covenant, for being by Indenture it is the words of both Parties, and it is more ſtrong being in the Caſe of the Queen.

Haughton ſaid, that 25 H. 8. Tit. Covenant. Covenant will lie againſt a Leſſee after Aſſignment, but Debt lieth not for Rent after the Leſſee hath accepted the Aſſignee for his Tenant, and therefore it ſeems that by the expreſs words of the Covenant that the Action lies.

Doderidge Juſtice contra, for between the Queen and the Leſſee there is privity of Contract, and alſo of Eſtate, ſo that the Queen, her Heirs and Succeſſors might have had an Action againſt the Leſſee or his Executors, upon the privity of Contract; and where the Leſſee aſſigns over, the Privity of Contract remains, but the Privity of Eſtate is gone to the Aſſignee, and now when the Queen grants over the Reverſion, the Privity of Contract is utterly determined, whereby the Action of Covenant cannot be maintained againſt the firſt Leſſee, or his Executors, who are more remote: to which Mountague Chief Juſtice agreed, ſee 2 H. 4 6. 6. H. 4. 1. and Co. lib. 3. Walker's Caſe, and the Judgments there cited, Et adjournatur.

The ſame Term in the ſame Court.

Bennet *verſus* Weſtbeck.

THE Caſe was thus: Tenant for life, Remainder for life, Reverſion in Fee, he in Remainder for life gives his Deed of Demiſe (with the Aſſent of the firſt Tenant for life) upon the Land to a Stranger in the abſence of the Leſſor, and ſaid, that he ſurrendred to him in Reverſion: And it was ſaid, that this Surrender being without Deed was not good to him who was abſent, and to confirm it, the Caſe was put out of 27 H. 8. Where Mountague Chief Juſtice ſaid, that if a Feoffment be made to four, and Livery is made to one in the abſence of the other, but in name of all, if it be by Deed this ſhall enure to all; but if it be without Deed, then only to him to whom the Livery was made: So here this Surrender doth not enure to him in the Reverſion, being abſent.

But Non allocatur, for the ſole Point now in queſtion, was, whether he in Remainder for life can ſurrender without Deed, and as to it this Rule was taken; viz. That that which cannot commence without Deed, cannot be granted without Deed, as a Rent, Reverſion, Common, Advowſon, &c. as 19 H. 6. 33. 14 H. 7. 3. 1 & 2 Phil. & Mar. 110. 22. Aſſ. Pl. 16. But in this Caſe this took effect by Livery and not by Deed, and therefore might be determined without Deed.

Whether Tenant for life in Remainder may ſurrender without Deed.

Mountague and Haughton agreed that it might be ſurrendred without Deed, becauſe it had its beginning without Deed, but it could not be granted over without Deed.

Doderidge Juſtice ſaid, that it could not be ſurrendred without Deed, but he ſaid, that Tenant in Poſſeſſion may, or Tenant for life and he in Remainder together may ſurrender to him in the Reverſion, but this ſhall enure as two ſeveral Surrenders: firſt of him in Remainder to the Tenant for life, and then by the Tenant for life to him in the Reverſion.

Crook Juſtice agreed with Doderidge, for the Eſtate of him in Poſſeſſion is an Eſtoppel to the Surrender, ſo that it could not be ſurrendred without Deed.

The ſame Term in the ſame Court.

Thurman *verſus* Cooper.

IN an Ejectione firmæ brought by John Thurman againſt William Cooper, upon the whole matter the Caſe was thus: Lands were given to a Man and Woman (who afterwards inter-marry) and to their Heirs and Aſſigns, Habendum to them and to the Heirs of their two Bodies engendred, the Remainder to them and the Survivor of them, with Warranty to them and their Heirs and Aſſigns for ever. And the Queſtion was what Eſtate this ſhall be? whether an Eſtate-tail or Fee-ſimple? or a Fee-tail with a ſimple Expectant? And it was ſaid that this ſhall be an Eſtate-tail only, for the Habendum qualifies the general words precedent, and with this agrees Perkins 35. b. and Coke, lib. 8. 154. b. Altham's Caſe: But it was anſwered and reſolved by the whole Court, that this is a Fee-tail with a Fee-ſimple expectant; and they obſerved theſe Rules.

1. That every Deed ſhall be taken moſt ſtrong againſt him that made it.

2. That every Deed ſhall be conſtrued according to the intent of the Maker, ſo that all the parts may be effectual if they can ſtand together with the Rules of Law, 40 E. 3. 5. Perry ſaith, that it is a Feeſimple, 21 H. 6. 7. that it is an Eſtate-tail with a Fee-ſimple expectant, Dyer 160. and Plowd. Paramore and Yardley's Caſe, the Law ſhall make an Order of words where there is no Order put by the Parties; and the words after the Remainder limited, are Tenendum de Capitalibus Dominis feodi, &c. and therefore it ought to be a Fee-ſimple, for if it were a Fee-tail, he ſhould hold of the Donor, as it is in Coke, lib. 6. Sir John Molin's Caſe, and other Books: and although the Warranty cannot enlarge an Eſtate, yet this expreſſes his intent to paſs a Fee-ſimple, and the Law ſhall make a Conſtruction that the Fee-tail ſhall precede, upon which the Fee-ſimple ſhall be expectant, according to that which is before ſaid, in Paramore and Yardley's Caſe.

Doderidge, If the Habendum had been to a Stranger, the Premiſſes had been but a Tail, as 7 H. 4. for otherwiſe the Habendum ſhall be void: But if Land be given to one and his Heirs (viz. in Tail) or if the ſaid Donee die without Iſſue of his Body, this had been but an Eſtate-tail only, becauſe it immediately checks and confirms the Premiſſes, to which Haughton agreed, Et adjournatur.

The

The ſame Term in the ſame Court.

Powel's *Caſe.*

POwel an utter Bariſter of the Temple, and alſo Town-Clark of Plimouth, brought an Action upon the Caſe againſt for theſe words, The Defendant ſuppoſing that the Plaintiff had wronged him in the Court of Plimouth, ſaid, that he was a Puritan Knave, a preciſe Knave, a bribing Knave, a corrupted Knave, and that he would make him anſwer for that which he had done in another place: And after Verdict for the Plaintiff, it was now moved, in Arreſt of Judgment that the words were not Actionable, becauſe he doth not ſcandalize him in his Profeſſion by which he acquires his Living.

Words, *That he was a Puritan Knave, a preciſe Knave, a bribing Knave, a corrupted Knave,* &c.

And Mountague Chief Juſtice ſaid, that this word Bribing doth not import that he took a Bribe, and therefore this word and all other words, but (corrupted Knave) are idle, but theſe words impeacheth him in his Office, for it hath reference to that, and therefore is Actionable, and Judgment was given accordingly.

The ſame Term in the ſame Court.

Sir Baptiſt Hickes's *Caſe in the Star-Chamber.*

SIR Baptiſt Hickes having done divers pious and charitable Acts, to wit, had founded at Camden in Glocesterſhire an Hoſpital for twelve poor, and impotent Men and Women, and had made in the ſame Town a new Bell tunable to others, a new Pulpit, and adorned it with a Cuſhion and Cloth, and had beſtowed Coſt on the Seſſions-Houſe in Middleſex, &c. one Auſtin Garret a Copy-holder of his Manor of Camden, out of private Malice, had framed and writ a malicious and invective Letter to him, in which in an ironical and deriding manner he ſaid, that the ſaid Sir Baptiſt had done thoſe charitable Works, as the proud Phariſee, for Vain-glory and Oſtentation, and to have popular Applauſe, and further in opprobrious manner taxed him with divers other unlawful Acts: And it was reſolved by the Court that for ſuch private Letters an Action upon the Caſe doth not lie at Common Law, for he cannot prove his Caſe, to wit, the publiſhing of it; but becauſe it tends to the breach of the Peace it is puniſhable in this Court, and the rather in this Caſe, becauſe it tends to a publick Wrong, for if it ſhould be unpuniſhed, it would not only deter and diſcourage Sir Baptiſt from doing ſuch good Acts, but other Men alſo who are well diſpoſed in ſuch Caſes; and therefore (as the Arch-Biſhop obſerved) this was a Wrong, 1. To Piety, in reſpect of the Coſt beſtowed on the Church. 2. To Charity, in regard of the Hoſpital. 3. To Juſtice, in conſideration of the Seſſions Houſe; and theſe things were the more commendable in Sir Baptiſt, becauſe he did them in his life time: For as Mountague Chief Juſtice obſerved, they who do ſuch Acts by their Will, do ſhew that they have no Will to do them, for they cannot keep their Goods any longer. And he only took a Diverſity where ſuch a Letter concerns publick matter as they did, or private in which Caſe it is not puniſhable.

Where a private Letter is puniſhable as a Libel.

But the Lord Coke ſaid, that it was the Opinion of the Judges in the Lord Treaſurer's Caſe, when he was Attorney, that ſuch a private Letter was puniſhable in this Court, and thereupon he had Inſtructions to exhibit an Infor-

mation, but the Lord Treaſurer Jacens in extremis was content to pardon him; and ſo it was reſolved between Wooton and Edwards: And Sir Francis Bacon Lord Chancellor ſaid, that the reaſon why ſuch a private Letter ſhall be puniſhed, is, becauſe that it in a manner enforceth the Party to whom the Letter is directed to publiſh it by his Friends to have their Advice, and for fear that the other Party would publiſh it, ſo that this Compullary Publication ſhall be deemed a Publication in the Delinquent; and in this Caſe the Party was fined at 500l.

The ſame Term in the ſame Court.

Bernard *verſus* Beale.

Words, That the Plaintiff had two Baſtards 36 years ſince.

AN Action upon the Caſe was brought for theſe words; viz. That the Plaintiff had two Baſtards 36 years ago, upon the report whereof he was in danger to have been divorced: And it was reſolved that for Defamation there was no Remedy but in the Spiritual Court, if he had no temporal Loſs thereby, and therefore it is not ſufficient to ground an Action to ſay, that he was in danger to be divorced, but that he was De facto, divorced, or that he was to have a Preſentment in Parriage, as it is in Anne Davies Caſe, Coke, lib. 4.

The ſame Term in the ſame Court.

Brabin *and* Tradum's *Caſe*.

A Prohibition for a Seat in the Church.

THE Caſe was; That the Church-Wardens of D. had uſed time out of mind to diſpoſe and order all the Seats of the Church, whereupon they diſpoſed of a Seat to one, and the Ordinary granted the ſame Seat to another and his Heirs, and excommunicated all others, who afterwards ſhould ſit in the Seat, and a Prohibition was prayed and granted, for this Grant of a Seat to one and his Heirs is not good, for the Seat doth not belong to the Perſon, but to the Houſe, for otherwiſe when the Perſon goes out of the Town to dwell in another place, yet he ſhall retain the Seat, which is no reaſon, and alſo it is no reaſon to excommunicate all others that ſhould ſit there, for ſuch great Puniſhments ſhould not be impoſed upon ſuch ſmall Offenders, an Excommunication being Traditio Diabolica.

The ſame Term in the ſame Court.

Fulcher *verſus* Griffin.

A Parſon covenant that his Pariſhioners ſhall pay no Tithes.

THE Parſon of D. covenanted with one of his Pariſhioners that he ſhould pay no Tithes, for which the Pariſhioner covenanted to pay to the Parſon an Annual Sum of Money, and afterwards the Tithes not being paid, the Parſon ſued him in the Court Chriſtian, and the other prayed a Prohibition: And it was agreed that if no Intereſt of Tithes paſs, but a bare Covenant, then the Party who is ſued for the Tithes hath no Remedy but a Writ of Covenant; And the better Opinion of the Court in this Caſe was, that this was a bare Covenant, and that no Intereſt in the Tithes paſs.

The

The Cuſtody of a Copy-holder that was a Lunatick, was committed to I. S. and for Treſpaſs done upon his Land, it was demanded of the Court in whoſe name J. S. ſhould bring the Action, and their Opinion was, that it ſhould be in the name of the Lunatick. *Darcie's* Caſe in the Common Pleas.

Trin. 15 *Jac.* In the *King's Bench.*

The Earl of Northumberland's *Caſe.*

THE Earl of Northumberland being ſeiſed of the Manor of Thiſtleworth, in which he had a Leet to be holden twice a year, to wit, within a month after Eaſter, and a month after Michaelmas, and Henry Devell being a Free-holder of the ſaid Manor erected a new Dove-coat at Heſton within the Precinct of the ſaid Leet, which was preſented at the Leet for a common Nuſance, for which Devell was amerced 40 s. and was commanded to remove it upon pain of 10 l. for the which a Diſtreſs was taken by Henry Sanders and others, as Bailiffs to the ſaid Earl, whereupon Devell brought a Replevin, and they made Avowry and juſtified as Bayliffs, and preſcribed that they uſed to make By-laws to redreſs common Nuſances, and alſo preſcribed in the Diſtreſs. And the Point in queſtion was, whether the new erecting of a Dove-coat by a Free-holder were a common Nuſance, and puniſhable in the Leet: And it was reſolved by the whole Court upon great deliberation, viz. Mountague Chief Juſtice, Crook, Doderidge and Haughton Juſtices, that it was not a common Nuſance, either puniſhable or inquirable in a Leet; and by Haughton a Man hath Jus proprietatis & privilegii in the Doves. 1. Property in reſpect of the place, as 22 H. 6. 39. Treſpaſs lies for taking a Goſhawk in reſpect of the place, as 3 H. 6. 55. For Hares, and Spencer's Caſe in Dyer, and ſo of other things which are Feræ Naturæ. And if a Deer goes out of a Park, albeit it be in the King's Caſe, yet it is lawful for the Owner of the Soil to take it, if it be in the place where the Deer hath Chaſe and Rechaſe: And by the Regiſter of Fitzherbert it appears that Treſpaſs lies Quare columbare fregit, & Columbas cepit: But 16 E. 4. 7. Treſpaſs doth not lie for killing of Doves, but there is a Quere of an Action upon the Caſe, and becauſe the Doves do no Treſpaſs, neither is there any Remedy for the killing of them, therefore they are no common Nuſance; for by Brook, 34 H. 6. Brook's Action upon the Caſe, the common Cuſtom is the Common Law, and there is no Authority againſt it, but Coke, lib. 5. 104. Boulſton's Caſe which is only on the bye, and is not agreeing with the Reaſon of the Principal, and this confirms my Opinion, Quod fuit conceſſum per totam Curiam, for there the principal Caſe was that a Man made Cony burrows, and the Conies ſtrayed into his Neighbour's Grounds, and adjudged that it was not Actionable; but it was lawful for any Man to kill them upon his own Ground; ſo here, &c. Whether the erecting of a Dove-coat be common Nuſance.

Doderidge, It may be an Hurt to the Commonwealth, but not a publick Nuſance, for that ought to be immediate or general.

1. Immediate it cannot be, for the erecting of a Dove-coat cannot in it ſelf be a Nuſance.

2. It is not general but particular to the Neighbouring Inhabitants: And it hath been allowed of all ſides, that a Man may have a Dove-coat by Preſcription, which could not be if it were a Nuſance; to which Mountague agreed: And it is lawful for any Man to kill the Doves upon his own Land, but they muſt beware that they do it not againſt any Statute, for Doves are preſerved by many Statutes, as by the Statute of Wales, made in the time of E. 1. and the Statute of 18 E. 2. gives Directions that the killing of Doves ſhall be

be preſented at the Léet: And the Statute of 18 Eliz. ordains that Doves ſhall not be ſhot.

3. However the Replevin lies for a fault in the pleading, for the harm and nuſance which the Doves do is laid to be Per totam patriam, whereas it ought to be within the Precinct of the Léet; to which Mountague agréed.

Crook, a Man hath Property in the Doves only by the Poſſeſſion, for being at large, they are Nullius in bonis, and when they are in his Poſſeſſion, to wit, in the Dove-coat, they do no harm to any: and it was lately ruled in this Court, that a Man cannot lay Logs in the King's High-way, although there be ſufficient Room for Paſſengers, becauſe it is a Wrong to have the High-way ſtraitned; ſo here a Preſcription ſhould not be good if it were a Nuſance, for it is all one to erect a great Dove-coat, or a little one, for a Nuſance Non recipit magis aut minus: And Bolſton's Caſe rather confirms than encreaſeth my doubt, and ſo I agrée with my Brethren.

Mountague, a Man hath Jus Duplex in Doves. 1. Jus proprietatis. 2. Jus privilegii, for they fly to and again, and (as Bracton ſaith) have Animum revertendi, and ſo have not other things which are Ferox naturæ: And it is a good Argument that this matter was never queſtioned, for it is without Queſtion. Littleton ſaith in the Caſe of Diſparagement, 21 E. 3. 4. They of the Léet ought to enquire of ſuch things as have been enquirable, yet the exceſs thereof is reſtrainable by the Juſtices of Aſſiſe.

Exceſs of Dove-Coats reſtrainable by the Juſtices of Aſſiſe.

A Precipe lies of a Dove-coat, as appears by the Werle, Mich. Col. and Dower and Partition lies thereof, which ſhews it to be lawful, and by the Book of 17 E. 4. 7. It ſeems that it is not lawful to take Doves: And as a Man cannot preſcribe to do a Nuſance, ſo the King cannot licence one to do it: And therefore I agrée that Judgment ſhall be given for the Dove-coat.

The ſame Term in the ſame Court.

Richardſon *verſus* Cabell.

RIchardſon, being a Parſon, libelled againſt Cabell in the Spiritual Court for Tithes, becauſe the ſaid Cabell being an Inn-keeper, took all the benefit of his Paſture by putting in Gueſt Horſes into his Paſture, whereupon Cabell prayed a Prohibition, and it was not granted, for it is Tithable in this Caſe: But if Cabell had taken a Crop of Hay, and afterwards he had put Gueſt Horſes into the Paſture, in that Caſe it had not been Tithable, for he had his Tithe before, and thereby it ſhould ſeem that ſome Crop is not Tithable.

Where Tithes ſhall be paid for Graſs of Gueſt Horſes.

The

The ſame Term in the ſame Court.

Southern *verſus* How.

RAlph Southern Plaintiff in an Action upon the Caſe againſt Robert How, ſhews for his Caſe, That the Defendant being a Gold-ſmith in London, and having counterfeit Jewels, knowing them to be counterfeit, ſent William Saldock his Servant with them to the Plaintiff, being a Merchant in Barbary, to uſe him for the Sale of the Jewels to the King of Barbary, and the Plaintiff thereupon ſold them to the King of Barbary for 800 l. and Saldock having received the ſaid Money, went from thence; And the Jewels being afterwards diſcovered to be counterfeit, the Plaintiff was taken and enforced by Impriſonment to make Reſtitution of the Money to the ſaid King. But it was ſaid by the Court, that the Verdict did not prove the Caſe, for it was found that the Defendant did not command his Servant to make uſe of the Plaintiff, nor to ſell to the King, but generally to any: And that the Jewels were of ſome worth, ſcil. 80 l. And it was agreed at the Bar, by Davenport, that in this Caſe the Action well lies, for the Maſter ſhall anſwer for his Servant, Dyer 151. the Lord North's Caſe, 5 E. 4. 1. the Sheriff ſhall be amerced for the ill Return of his Bailiff: And if I command my Servant to kill one, who commands another, in this Caſe his Maſter ſhall not be puniſhed, but in Treſpaſs all are Principals, and 2 H. 4. 18. If a Servant burns his Maſter's Houſe, whereby another Houſe is burnt, there the Maſter ſhall anſwer for it, for 14 H. 8. 31. b. an Action upon the Caſe lies where there is no other Action provided for ſuch a thing, ſo that an Action well lies in this Caſe, and ſee Doctor and Student 137. in what Caſe the Maſter ſhall anſwer for his Servant.

Where a Maſter ſhall be anſwerable for his Servant, and where not.

Coventry Solicitor, to the contrary, for it was lawful for the Plaintiff to command his Servant to ſell them, for it was found by the Verdict that the Jewels were of ſome worth and value, and he did not command him to ſell them for more than they were worth, and 9 H. 6. 53. b. If the Maſter ſend his Servant into a Fare, or Market, to merchandize for him, the Maſter ſhall not be puniſhed for his fault. And in this Caſe the Command was not to deal with the Plaintiff, or to ſell to any one in particular, and for it ſee 9 H. 6. aforeſaid: and if the Servant will exceed the lawful Command of his Maſter, the Maſter ſhall not be puniſhed therefore, but if the Command be unlawful it is otherwiſe. 11 E. 4. 6. A Man ſells Cloth of ſuch a length, which proves to be ſhort of the length, an Action lies not without a Warranty, ſo Fitz. N. B. 64. c. For Wine if it be warranted to be good, an Action lies if it be corrupt. If my Beaſts go into another Man's Soil, an Action lies againſt me, but if my Servant drive my Beaſt into another Man's Soil, I ſhall not be puniſhed, for he doth this of his own wrong, without any ſuch Warrant from me, 13 H. 7. b. And if when a Man ſell a thing for more than it is worth, an Action would lie for it, we ſhould never have an end of Actions. And the Action doth not lie for another reaſon, becauſe it doth not appear that the King of Barbary did lawfully impriſon the Plaintiff, 26 H. 8. 3. If a Man makes a Leaſe, and covenants that he ſhall not be diſturbed, if a Stranger diſturb him, an Action lieth not againſt a Covenantor, ſo here, &c. for it ſeems it was Ex regali poteſtate, and not in a lawful manner, and ſo he concluded that the Action will not lie, and ſo it was reſolved by the whole Court.

Mountague

Mountague Chief Juſtice, the Plaintiff is no Party who ſhall have the Action but the King of Barbary. 2. The Verdict is contrary to the Declaration, and Jewels are in value according to the Eſtimation, and therefore 38 Eliz. between Simſon and Sanders in the Star-chamber, it was reſolved that a Man ſhall not be puniſhed for Perjury upon the Valuation of Jewels.

Doderidge ſaid, that 22 Eliz. an Action upon the Caſe was brought in the Common Pleas by a Clothier, that whereas he had gained great Reputation for his making of his Cloth, by reaſon whereof he had great Utterance to his great benefit and profit, and that he uſed to ſet his Mark to his Cloth, whereby it ſhould be known to be his Cloth: And another Clothier perceiving it, uſed the ſame Mark to his ill-made Cloth on purpoſe to deceive him, and it was reſolved that the Action did well lie.

The ſame Term in the ſame Court.

A *Certiorari* granted into *Wales*.

UPon an Indictment of Barretry before the Juſtices of Wales, a Certiorari was moved for to remove it into this Court: And it was ſaid at the Bar that it had not been ſeen from the time of E. 1. that ſuch a Writ had been granted in the like Caſe, and therefore he collected, that it ought not to be granted: But it was reſolved by the Court, that a Certiorari ſhould be granted, in regard it is in the King's Caſe, and by Haughton Juſtice, notwithſtanding the Statute Quod communia placita non ſequantur Curiam noſtram yet it is plain that the King may ſue in what Court he will: And albeit this Writ in ſuch a Caſe ought not to be granted in Caſe of a common Perſon, yet that is no reaſon but that it may be granted in the Caſe of the King.

The ſame Term in the ſame Court.

Sir Henry Glemham's *Caſe*.

IN a Quo warranto againſt Sir Henry Glemham for uſing certain Liberties, to which Sir Henry pleaded in Bar, and the King's Attorney replied, and ſo this matter reſted three years, and then the King's Attorney put in a new Replication, and joyned Iſſue upon other Points: and it was moved for the Defendant that he might put in a new Bar, in regard the Replication is altered, and nothing was entred, but all remained in Paper: And it was agreed by the Court that the King ſhall not be concluded but that he might put in his Replication at any time; And that the King cannot make a double Plea, for the other Party ſhall anſwer firſt to one, and then to the other: And the Court would not allow Sir Henry to make a new Bar in this Caſe, without the Aſſent of the Attorney, who would by no means agree to it: And in Caſe of a common Perſon, this ſhall not be allowed without the Aſſent of Parties.

A Plea not to be amended in another Term, without Aſſent of Parties.

In the ſame Term in the ſame Court.

IN an Action of Trover and Converſion between one Nicholas and William Ward, it was agreed that Tithe-Lamb and Wooll was included within ſmall Tithes: And Mountague ſaid, that a Vicaridge endowed might be appropriated but not to the Parſon, to which Haughton and Doderidge agreed, 31 H. 6. Fitz. tit. Indicavit, is that ſuch a Vicaridge may be diſſolved:

Lamb and Wooll included in ſmall Tithes.

solved: An Appropriation may be by the King sole where he is Patron, but there is no Book that it might be by the Patron sole. Grindon's Case in Plowden, and 17 E. 3. 39. An Appropriation cannot be without the King's Licence.

The same Term in the same Court.

Blaxton *versus* Heath.

IN an Action of Debt by Blaxton against Heath, the Case was this. A Man possessed of a Term for twenty years, in Right of his Wife, made a Lease for ten years, rendring Rent to him, his Executors and Assigns, and died. And the Question was whether the Wife shall have the Rent after his death, or his Executors; and it was argued, that the Wife should not have it, because she was in by a Title Paramount; as if there be two Joynt-Tenants for life, the one makes a Lease for years rendring Rent, and dies, the other shall not have the Rent, Dyer 167. and so of Joynt-Tenants in Fee, Coke, lib. 1. 96. and Perkins accordingly: To which Mountague Chief Justice agréed, for he said, it was but an Extract of ten out of twenty, the Remainder continuing as before: And Redditus is Reventus, a turning again, but it is otherwise of a Condition, which is a new Creature, of which the Wife shall take no advantage.

Crook Justice, this is a special Reservation, and therefore the Executor shall have it, and not the Wife, for she comes in Paramount, as in the Case of Joynt-Tenants: Haughton agréed thereunto, and said, that the Rent shall be incident to him who hath the Reversion under the Lessor, who is the Executor: And Mountague demanded of Hobert Chief Justice of the Common Pleas, his Opinion in this Case, who agréed that the Wife should not have it.

The same Term in the same Court.

Dennis *versus Sir* Arthur Mannaring, *and others.*

IN the great Case between Gabriel Dennis Plaintiff, in Trespass against Sir Arthur Mannaring and Brimblecomb, and others, the Verdict was found for the Defendants: And now it was moved in Arrest of Judgment for the Plaintiff, because no Bail was entred for Brimblecomb one of the Defendants, for every Defendant is supposed in Custodia Marescalli, and in this Case the Venire facias is awarded to try the Issue betwéen the Plaintiff and Defendants, where one of the Defendants is no Party in Court: And Serjeant More put the Case of the Lord Chandoys and Sculler, and other Defendants, where the Judgment in such a Case was resolved to be erroneous.

A Verdict is given in B. R. before any Bail entred, not good.

Mountague, We ought Discernere per legem quid sit justum, and here Brimblecomb being no Party in Court, no Verdict could be given.

Doderidge, I have seen in this Court, where upon a Writ of Error brought in such a Case, we have compelled him to put in his Bail, because he should

not take advantage of his own wrong and folly: But because that here no fraud appeared to be in the Plaintiff, he shall not be bound to stand to the Verdict: Haughton agreed, but Crook seemed to the contrary: But it was agreed, that if Brimblecomb had appeared at the Suit of any other, the same Term, it had been sufficient: And these Books were cited to be in the Point, 32 H. 6. 2. 8 E. 4. 5. 21 H. 6. 10.

The same Term in the same Court.

Hide *verſus* Whiſtler.

Exception of all Wood, Under-wood, Coppices and Hedge-rows.

A Coppice, what it is.

William Hide made a Lease for years of certain Lands to Whistler, excepting to the Lessor all his Wood and Under-wood, Coppices and Hedge-rows; and in a Replevin the question was, whether the Soil shall pass thereby; for the Lessee put his Beasts into a Coppice, and the Lessor distrained them, whereupon, &c. And the words of the Exception were further, standing, growing, and being in and upon the Premisses: And the Lessee covenanted to make Fences, but if the Lessor made new Coppices, that the Lessee should not make Fences about them. And it was said, that a Coppice signifies a parcel of Land fenced for the safegard of young Trees. And it was said for the Plaintiff, that Premisses are Pre dimissa, and by these words, growing, and being in the Premisses, it shall be intended that the Soil did not pass, for it is pre-demised: But it was resolved, that the Soil it self was excepted by the Exception of the Wood and Coppice, 14 H. 8. 1. The Bishop of London's Case, Coke, lib. 5. Ives's Case, and lib. 11. Lyford's Case: And by the reserving of a Coppice the Soil it self is reserved; for by Mountague, that which is reserved is not demised, and so the Distress well taken. Crook agreed, and he said the difference was good between Wood and Trees, for by the excepting of Wood, the Soil it self is excepted, otherwise of Trees: Haughton agreed that the Soil it self is excepted in this Case, and so it was adjudged.

The same Term in the same Court.

Talbot *verſus Sir* Walter Lacen.

Covenant to leave the Premisses in Reparations at the end of the Term.

In a Writ of Covenant brought by Margaret Talbot against Sir Walter Lacen, upon a Lease made by the Plaintiff to the Defendant, of a Park, &c. for five years, if she should live so long, in which the Lessee covenants for him, his Executors and Assigns, to keep the Premisses in good Reparations, and so to leave them at the end of the Term, and also to deliver to the Plaintiff (upon notice given) four Bucks, and four Does in season, during the life of the Plaintiff, in every of the said years: And after the expiration of the aforesaid Term of five years she brought a Writ of Covenant, and assigned the Breach, because that in the end of the Term he committed Waste, and because that after the end of the Term the Defendant refused to deliver the Deer; And albeit the words of the delivery of the Deer are, during the life of the Plaintiff, yet they are also every of the aforesaid years, and therefore it was resolved that she shall not have them during her life in this Case.

And

And for the other Point it was objected, that in Fine termini, was incertain, for it may extend after the Term, but Ad finem termini had been sufficient, Old Book of Entries, 169. for when he covenants that at the end of the Term, he would leave the Premisses in Reparations, and Ad finem termini, he did waste, this ought of necessity to be intended a Breach of the Covenant, and therefore it was adjudged that the Action of Covenant well lies.

Mich. 16 *Jac.* In the *King's Bench.*

Havergall *and* Hare's *Case*.

IN this Case (which see before, fol. 1. b.) four Points were observed. Before fol. 1. b.

1. Whether Fisher the Assignée of the Rent were such a Person who shall take benefit of the Entry? Conta p. 126

2. When 10 l. is only in Arrear, whether the Rent of 20 l. shall be said in Arrear?

3. Whether these Advantages which were first granted with the Rent may be granted over?

4. When the Use shall rise, whether upon the first Indenture of the Grant of the Rent, or afterwards? For the Case was, that the Grantée of the Rent of 20 l. covenanted by the same Indenture, that if the said Rent of 20 l. were in Arrear for the space of twenty days after any day of Payment, that the Grantée shall distrain, and if there be no sufficient Distress upon the Land, or if there be a Rescous, Replevin, or Pound-breach, that then it shall be lawful for the Grantee and his Heirs to enter into the same Land, and to retain it until he be satisfied: And the said Rent was granted, 9 Jac. it was Arrear, 11 Jac. the Fine for the better Assurance of the Rent was levied 12 Jac. and 13 Jac. the Distress was taken.

There were four Causes which give an Entry, and upon the Distress and Replevin brought the Assignée enters. As to the three first Points, it was resolved by the whole Court,

1. That Fisher was such an Assignée who shall take benefit of the Entry.

2. When 10 l. is only Arrear, the Rent of 20 l. shall be said Arrear, whereupon there shall be a Title of Entry.

3. That these Advantages granted with the Rent may be granted over.

And as to the fourth Point, it was holden by Mountague and Crook, that the Use riseth upon the first Indenture, and not upon the Entry after the Replevin brought, although the words are, that then it shall be lawful for the Grantée and his Heirs to enter, whereby the Use is only awaked, as it is in the principal Point in Shelley's Case, and although a Fine is afterwards levied, yet the Use shall be directed by the Original Indenture, and therefore 6 Rich. 2. A Feoffment is made to two and their Heirs, and afterwards a Fine is levied upon it for further Assurance, to the use of them and the Heirs of one of them, yet it shall go to the use of both, for it shall be respected according to the original Agreement, where there are divers Assurances for the perfecting of one and the same thing, 16 E. 3. tit. Age. A Daughter had a Seigniory by descent, a Tenancy Escheats, a Son is born, he shall have the Land, see Sharoe's Case in 4 Mar. Dyer, and in Chudleigh's Case all looks to the original Agreement, and therefore Variance of time shall not hinder the original Agreement, as 33 Ass. the Servant intends to kill his Master, and afterwards the Master puts him out of his Service, and then he kills him, this shall be Petty Treason in the Servant, 28 H. 6. Two are bound in a

Bond at ſeveral times, and yet he ſhall declare againſt both, as upon the firſt Delivery, 11 H. 7. it is adjudged, that if a Deed be delivered by an Infant, and afterwards it is again delivered when he comes of full Age: And ſo Mallorie's Caſe, Finch's Caſe, and Boraſton's Caſe, Nunc & tunc & quando, are a demonſtration of the time, and not of the matter, and ſo they concluded that the Uſe ſhall riſe upon the firſt Indenture, and not upon the Fine or Replevin brought; but Doderidge and Haughton Juſtices contra.

Trin. 17 *Jac.* In the *King's Bench.*

Silveſter's *Caſe.*

JOhn Silveſter promiſed to John B. that if he would marry his Daughter, that he would give with her a Childs part, and that at the time of his death he would give to her as much as to any of his Children, excepting his eldeſt Son, and afterwards he made his Executors and died: J. B. brought an Action upon the Caſe againſt the Executors upon this Promiſe, and ſhewed that the Executor had not given him a Child's part, and that ſuch a younger Son of the Teſtator's had an 100 l. given him: And it was reſolved by the Court that the promiſe of a Childs part is altogether incertain, but being ſo much as any of his Children had, and then ſhewing that the younger Son had an 100 l. this was certain enough, and thereupon Judgment was given for the Plaintiff.

The ſame Term in the ſame Court.

Godfrey *and* Owen.

Words. *He is a very Varlet, and ſeeks to ſuppreſs his Brother's will,* &c.

COrnelius Godfrey was Plaintiff in an Action upon the Caſe for words againſt Owen Defendant, and the words were theſe, to wit, He is a very Varlet, and ſeeks to ſuppreſs his Brother's Will, he makes ſhew of Religion, but he is a very Hypocrite: And the words were ſpoken of a Merchant, to one who gave him much Credit in his Weave.

Mountague Chief Juſtice ſaid, that the words which are Actionable in ſuch a Caſe ought to touch the Plaintiff in his Profeſſion, which theſe do not do, Et relata ad perſonam intelligi debent ſecundum conditionem perſonæ, for in the ſuppreſſing of his Brother's Will the Caſe might be ſuch that he might well do it, for perhaps there may be an after Will made; And for calling him Hypocrite lies not in the conſtance of the Common Law, for GOD only can judge of the Heart of Man, and therefore theſe words do not touch the Plaintiff as he is a Merchant.

Doderidge Juſtice, Words ought to tend ſome way to the Ruin of the Party, or otherwiſe they are not Actionable; and Judgment was given, Quod querens nil capiat per billam.

Mich.

Mich. 16 *Jac.* In the *Star-Chamber.*

Sir John Bingley's *Case.*

IN Sir John Bingley's Case in the Star-chamber, it was resolved by the two Chief Justices, Mountague and Hobart, and agreed by the Lord Verulam Lord Chancellor, and Sir Edward Coke, that if an Information be exhibited there which begins with divers particular Misdemeanors, and conclude in the general that, 1. The matter included in the general Charge ought to be Ejusdem generis. 2. They ought to exceed the Particulars expressed in number. 3. They ought not to be greater or more capital; whereupon Mountague cited the Statute which speaks of Deans and other Spiritual Persons, upon which it hath been resolved that Bishops are not within it, for they are of an higher degree: and the principal reason of these Rules was, because that a Man cannot possibly make a Defence, because he knows not what shall be objected against him; and upon this Sir John Bingley was discharged at this time for the most transcendent Offence that was objected against him, to wit, concerning Captain Baugh, and other Pirates to whom the King of his Grace and Bounty had given 200 l. to make them Loyal Subjects; But Sir John Bingley, Colore officii, had defrauded them of almost all of it, for the want whereof some of them died miserably, and the rest became Pirates again. But Sir John Bingley made many Protestations of his Innocence in this matter.

An Officer of his own Wrong.

And it was holden also that one might be an Officer of his own Wrong, as there might be an Executor of his own Wrong: And this was Sir John Bingley's Case for something in the Information, for he committed Extortion, Colore officii.

The same Term in the Star-Chamber.

THE Attorney-general put in an Information against divers Dutch Merchants, for buying and transporting of many great sums of Gold and Silver Bullion.

And it was said by the Court that divers Statutes had been made for redress of this mischief, as the Statute of 5 R. 2. the Offenders whereof ought to forfeit all they may: and by another Statute in 17 E. 4. this Offence was made Felony to continue for seven years: But the Court would not now punish them upon any Statute, for it was an Offence at Common Law, and therefore punishable in this Court.

To carry Gold and Silver out of the Realm, punishable at Common Law.

And Sir Edward Coke said, that if any be to be punished upon a penal Statute, it ought to be within two or three years at least after the Offence committed, for the Informer hath but a year to sue, and the King two years for the most part.

The Statutes of 37 E. 3. and 5 E. 6. prohibite the buying of Coin, and that it is so at the Common Law, 21 E. 3. 60. and Plowd. 215. and not only he that buys, but he that sells also offends in it, for it is a Prerogative only belonging to the King, and it is his Coin, and none can put a Value upon it but himself, which is a Flower of his Crown.

Hobart Chief Justice of the Common Pleas, as one shall be punished for ingrossing any Commodity, a Fortiori, one shall be punished for ingrossing and buying of a great quantity of Money, all other Commodities being thereby ingrossed

ingroſſed, for Money is the Miſtreſs of Commerce: Pecunia eſt rerum omnium vendendarum menſura, Bracton 117. 18 E. 3. Hollinghead 109. 50 E. 3. Rot. Pat. Memb. 7. And for Tranſportation, 17 E. 3. & 19 E. 3. Rot. Pat. 24. De monetis non tranſportandis, 19 R. 2. Rot. Pat. The Dutcheſs of obtained License to melt Coin to make Plate. And divers of the Defendants were within the King's general Pardon, but in as much as they pleaded it in their Rejoynder, and not in their Anſwer (as it ought to be) the Court overruled their Plea, ſo that they could have no advantage thereby. But in as much as they were Strangers, and not conſtant of our Laws, and relied only upon their Counſel, the Court had conſideration thereof in their Cenſure.

Hillary, 17 *Jac.* In the *King's Bench.*

Serle *verſus* Mander.

Words, *I arreſt you upon Felony.*

SErle brought an Action upon the Caſe againſt Mander for theſe words, to wit, I arreſt you upon Felony, and after Verdict for the Plaintiff, it was moved in Arreſt of Judgment by Richardſon that the words were not Actionable, for he doth not ſay, that the Plaintiff had committed Felony; But it was reſolved by the Court, and ſo adjudged that the Action lieth.

The ſame Term in the ſame Court.

Judgment againſt a Defendant when beyond Sea with an Ambaſſador reverſed.

A Judgment was obtained againſt one of the Servants of the Lord Hay, Viſcount Doncaſter, when he was Ambaſſador in Bohemia, and attending upon him there: And this matter being diſcloſed to the Court by the Council of the Defendant, they would not ſuffer the Plaintiff to have Execution upon the ſaid Judgment, but ordered the Plaintiff to declare De novo, to which the Defendant ſhould preſently anſwer.

Imparlance.

Memorand. It was ſaid to be againſt the Courſe of the Court, to have an Imparlance before the Declaration entred.

The ſame Term in the ſame Court.

The King *againſt* Briggs.

A Subject cannot have a Foreſt.

A Quo Warranto was brought by the King againſt Briggs, for exerciſing of certain Privileges, who juſtified by virtue of a Foreſt granted to him: And by Bridgeman, this is the firſt Quo warranto which he knew that had been brought againſt any Subject for a Foreſt, for a Subject cannot have a Foreſt, but he may have a Chaſe, which peradventure may paſs under the name of a Foreſt. And there are divers Incidents to a Foreſt which a Subject cannot uſe nor have; there ought to be a Juſtice of a Foreſt which a Subject cannot have, and ſuch a Juſtice ought to be a Man of great Dignity. 2. There ought to by Verderors who are Judges alſo, and by 34 E. 1. Ordinatio Foreſtæ, ought to be by Writ, but a Subject cannot award a Writ. Alſo there are three Courts incident to a Foreſt.

1. A Court of Attachments which may be without Verderors.
2. The Swainmote Court.

3. The

3. The Juſtice-Seat, and this appeareth in 1 E. 3. cap. 8. 21 E. 4. cap. 8. But by the Statute of 27 H. 8. cap. 7. There are ſome other Incidents to a Foreſt. 2. Admit that a Subject may have a Foreſt, yet it fails in this Caſe, becauſe he hath ſhewn the Exemplification and not the Letters Patents, and ſee Coke, lib. 5. Pain's Caſe, that neither an Exemplification, or Conſtat, are pleadable at Common Law, and Coke, lib. 10. Dr. Leyfeild's Caſe.

The ſame Term in the ſame Court.

Sir William Webb *verſus* Paternoſter.

THE Caſe was this; Sir William Plummer licenſed Sir William Webb to lay his Hay upon the Land of the ſaid Sir William Plummer until he could conveniently ſell it, and then Sir William Plummer did make a Leaſe of the Land to Paternoſter, who put in his Cattel, and they eat up the Hay: And it was two years between the Licenſe and the putting in of the Cattel, and yet Sir William Webb brought an Action of Treſpaſs againſt Paternoſter for this.

Mountague Chief Juſtice: 1. This is an Intereſt which chargeth the Land into whoſe ſoever hands it comes, and Webb ſhall have a reaſonable and convenient time to ſell his Hay. 2. The Leſſee ought to give notice to Sir William Webb of the Leaſe before he ought to put in his Cattel; to which Haughton Juſtice agreed in both Points: But Doderidge Juſtice ſaid, that Sir William Webb had no certain time by his Licenſe, yet he conceived that he ought to have notice: But it was reſolved that the Plaintiff had a convenient time (to wit, two years) for the removing of his Hay, and therefore Judgment was given againſt him. But admit that there had not been a convenient time, yet the Court was of Opinion that the Plaintiff ought to have incloſed the Land at his peril, for the preſervation of his Hay: And it was agreed that a Licenſe is countermandable, although it be concerning Profit or Pleaſure, unleſs there be a certain time in the Licenſe, as if I licenſe one to dig Clay in my Land, this is revocable, and may be countermanded although it be in point of Profit, which is a ſtronger Caſe than a Licenſe of Pleaſure, ſee 13 H. 7. The Dutcheſs of Suffolk's Caſe for a Licenſe.

Notice.

Convenient time.

A Licenſe whether for Profit or Pleaſure counterman-dable.

The ſame Term in the ſame Court.

SIbill Weſterman brought an Action upon the Caſe againſt Everſall, and had Judgment: and in the Entry of the Judgment ſhe was named Iſabel, 1 Aſſ. and 3 Aſſ. A Fine was levied by Sibill, when her name was Iſabel, and it was not good, for it doth not appear to be the ſame Party; ſo in the Caſe at the Bar: And for this the Judgment was reverſed.

Error. *Sibill* for *Iſabel.*

In the ſame Term in the ſame Court.

JAne as Executor of brought an Action upon the Caſe againſt Cheſter, becauſe the Defendant made Requeſt to the Teſtator of the Plaintiff to buy for him certain Silk Stuffs for Apparel, and to make him a Cloak; the Defendant pleaded that he was within Age, and George Crook ſaid, that the Defendant ſhould not be charged, becauſe it is not ſhewn that the Apparel was for the Infant himſelf, but he was over-ruled in this, for it is ſufficiently

An Infant chargeable for neceſſary Apparrel.

ciently expreſſed to be for him. And it was agréd by the Court, that it ought to be ſhewn that it was Pro neceſſario veſtitu, and it ought to be ſuitable to his Calling, and (as Doderidge ſaid) that there was a Caſe adjudged in this Court betwéen Stone and Withipole, that where Withipole had taken of Stone certain Stuffs for Apparel, being within Age, and afterwards he promiſed Payment if he would forbear him ſome time, and the Aſſumpſit adjudged not good, becauſe he was not liable for the Debt at firſt for the reaſon aforeſaid.

Trin. 17 *Jac.* In the *Common Bench.*

Gilbert de Hopton's *Caſe.*

Words. *Thou art a Thief and haſt ſtolen my Furze.*

AN Action upon the Caſe was brought for theſe words, viz. Thou art a Thief and haſt ſtolen my Furze: And after Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that theſe words were not Actionable: But it was ſaid on the other ſide, that to ſay, thou art a Thief, is Actionable, and the ſubſequent words are in the Copulative, and enure as a confirmation of the precedent words: But if it had béen for, Thou haſt ſtolen my Furze, this had béen an explanation of the precedent words, and therefore in that Caſe the Action would not have béen: And it was anſwered and reſolved by the Court that the word (and) in ſome Caſes ſhall be taken as the word (for) and ſo it ſhall be in this Caſe, and therefore adjudged that the Action lies.

Mich. 22 *Jac.* In the *Star-Chamber.*

Fines in the Star-Chamber for killing the King's Deer.

TWO Men came Ore tenus into the Star-Chamber, for ſtealing of the King's Deer, and were fined an 100 l. apiece, and three years Impriſonment, unleſs it would pleaſe the King to releaſe them ſooner, and before they ſhould be releaſed of their Impriſonment to be bound to their good Behaviour: And it was obſerved by the Attorney-general that the Offence was the greater, in regard that the King had but one Darling Pleaſure, and yet they would offend him in that: And it was ſaid by ſome of the Court that it was a great folly and madneſs in the Defendants to hazard themſelves in ſuch a manner for a thing of ſo ſmall value as a Deer was. The Lord Preſident ſaid, that Mr. Attorney was the beſt Keeper the King had of his Parks, in regard he brings the Offenders into this Court to be puniſhed: The Lord Keeper ſaid, that the Defendants in ſuch a Caſe being brought Ore tenus are are not allowed to ſpeak by their Council, and yet theſe Men have had their Council, but it was Peter's Counſellors, meaning, their ſorrow and Contrition at the Bar, which much moved him, ſo that if his Vote might prevail he would ſet but 20 l. Fine upon them.

The ſame Term in the ſame Court.

THE Lord Morley and Sir Richard Mollineax being beyond Sea, their Sollicitor in their names exhibited a ſcandalous Bill in the Star-Chamber againſt the Biſhop of Chicheſter, and after their Return this continued ſo for three years, without any diſclaiming thereof by them, and now the matter

ter being queſtion, they ſaid that it was not done with their Privity: But becauſe they had not diſclaimed the Fact before, they were fined an 100 l. to the King, and an 100 l. to the Biſhop for Damages, and the Bill was to be taken off the File.

The ſame Term in the ſame Court.

Lewes *Plaintiff verſus* Jeoffreys, *and others Defendants.*

THE Plaintiff's Brother had been a Suitor to a Woman, which matter proceeded to a Contract, and afterwards the Defendant Jeoffreys happened to be a Suitor to her alſo, whereupon (being Rivals) they fell out, and the Plaintiff's Brother called the Defendant Jackanapes, which was taken very ill by the Defendant (being a Juſtice of Peace in the County of Worceſter, and the other being but a mean Man in reſpect of him) ſo that he told him that if he would meet him on Horſe-back he would fight with him: afterwards one of the Sons of the Defendant went to the ſaid Brother (being upon his own Land, and gave him a mortal Wound, whereupon a Friend on the behalf of the Party wounded, came to the Defendant (being a Juſtice of Peace) and brought him a piece of his Skull, to the end that his Son ſhould be forthcoming at the next Aſſiſes, declaring to him the danger of death the Man was in: whereupon the Defendant took a Recognizance of 10 l. of his Son and of his Sureties of 5 l. apiece to anſwer this at the next Aſſiſe: And in the mean time the Party died of the ſaid Wound, and the Son did not appear at the Aſſiſes, and the Judges of Aſſiſe fined the Defendant an 100 l. for taking ſuch ſlender Security for the Appearance of his Son, which was paid, and yet, notwithſtanding the Defendant was fined 200 l. more for this Offence, and alſo 200 l. for his Miſdemeanor in his Challenge, albeit the Defendant was of the Age of 63 years, and ſo it ſeems that he intended to fight with him. But he being a Juſtice of Peace (who is Conſervator pacis) he did againſt his Oath to do any thing which may tend to the breach of the Peace. A Challenge fined in the Star Chamber.

And for the other matter it was ſaid by the Court, that the Defendant being Father to the Offender, it had been better for him to have referred this matter to another Juſtice of Peace, or at leaſt to have had the Aſſiſtance of another: And the Party being in ſuch great danger of death, his Son was not Bailable.

Hill. 1 *Car.* In the *King's Bench.*

Bowyer *verſus* Rivet.

THE Caſe was thus; Sir William Bowyer, 12 Jac. recovered againſt Sir Thomas Rivet in an Action of Debt, Sir William made his Wife his Executrix and died, the Wife made Bowyer her Executor and died; then Sir Thomas Rivet died, Bowyer brought a Scire facias to have Execution upon the Judgment againſt Sir Thomas Rivet the younger, as Heir Apparent to the Land to him deſcended from Sir Thomas Rivet, who pleaded Riens per deſcent from Sir Thomas Rivet, and it was found that he had two Acres and an half of Land by deſcent; and it was prayed by Goldſmith, that Judgment might be given againſt Sir Thomas Rivet generally, for he ſaid, that this

falſe Plea ſhall charge him and his own Lands, and cited Plowden 440. where in Debt againſt an Heir, upon his falſe Plea, his own Lands ſhall become liable to the Debt, and Co. lib. 3. 11. b. Sir William Herbert's Caſe, where the Caſe was upon a Scire facias againſt the Heir, as it is in this Caſe.

But on the other part it was argued by Richardſon the King's Serjeant, Banks, and all the Juſtices, that Execution ſhall be awarded in no other manner againſt the Heir than it ſhould be againſt his Anceſtor, or other Purchaſor, to wit, of a Moyety of that which he had by Deſcent, for as much as in this Caſe he cannot be to this purpoſe charged as Heir, but he ought to be charged as Ter-tenant and as a Purchaſor, and a Purchaſor ſhall never hurt himſelf but his falſe Plea.

And Banks argued, that the Heir in this Caſe is charged as a Purchaſor, and the falſe Plea of a Purchaſor ſhall never charge himſelf, 33 E. 3. Fitz. Execution, 162 and 6 E. 3. 15. and that in this Caſe he is charged as Ter-tenant appears by three reaſons.

1. Debt will not lie againſt an Heir, but where he is bound as Heir, but in this Caſe Execution is to be ſued againſt him as another Ter-tenant, Dyer 271. 11 E. 3. 15. and in 27 H. 6. Execution 135. and Co. lib. 3. 12. b. That in Judgment upon Debt or Recognizance the Heir is charged and Execution ſhall be ſued againſt him as Ter-tenant.

2. There is not any lien as Heir, for the Judgment doth not mention the Heir, and therefore he cannot be charged unleſs he be expreſly bound, and in the Record of the Recovery, it doth not appear that the firſt lien ſhall bind the Heir, for he declares that he bound himſelf, and not that he bound himſelf and his Heirs.

3. If the Heir were bound in the Obligation ſo that he were once bound as Heir, yet the Judgment determines the Specialty, ſo that now he is not bound, and in the Judgment the Heir is not mentioned, as in 10 H. 4. 21. 24. If an Abbot contract to the uſe of the Houſe without conſent of the Covent, this ſhall bind if he dies, but if he takes an Obligation of the Abbot and then he dies, this ſhall not bind the Houſe, for the Contract is determined by the Obligation, and this is the reaſon that in the time of E. 3. in a Recovery upon Debt the Obligation was cancelled.

Where a Debt is recorded upon Bond the Obligation was cancelled.

4. Here he cannot be charged as Heir, for it appeareth by the Record that his Father is living, for it is brought againſt him as Heir Apparent, which he cannot be but during the life of his Father.

And as to the Objection, that in this Caſe he ſhall have his Age, and therefore ſhall be charged as Heir, Non ſequitur, for if Execution be ſued againſt the Heir of a Purchaſor, he ſhall have his Age, and yet he is not Heir, neither can be charged as Heir to the Conuſor: But becauſe it is a Rule in Law, that the Heir which hath by Deſcent ſhall not anſwer where his Inheritance may be charged during his Nonage.

Whitlock to the ſame intent, becauſe the Heir is not charged here as Heir, but as Ter-tenant, whereby his falſe Plea ſhall not hurt him, with which Jones alſo agreed, and ſaid, that he here conſidered three things.

1. That the lien of the Anceſtor binds the Heir.

2. How the Heir ſhall behave himſelf in pleading.

3. Our Point in queſtion. For the firſt there are two things requiſite to bind one as Heir. 1. A lien expreſs, for if one bind himſelf, and not his Heir, this ſhall not bind his Heir in any Caſe. 2. A Deſcent of Inheritance, for without this he ſhall not be bound by the Act of his Anceſtor, and he is bound no longer than Aſſets deſcend, for if he alien before the Writ purchaſed the lien is gone. 2. He ought to behave himſelf truly and plead truly, and conſeſs the Aſſets deſcended to him, when Debt is brought againſt him as Heir, otherwiſe his own Lands ſhall be charged with the Debt, as it is in Pepy's Caſe in Plow. Com. But where it is ſaid in Pepy's Caſe, that upon a Nihil dicit,

or

or Non ſum informatus, &c. If the Judgment paſs upon them, that it ſhall be general; I am not of that Opinion, for the common Experience of the Courts is, that ſuch a general Judgment ſhall not be given againſt the Heir; unleſs it be upon a falſe Plea pleaded, with which agrées Lawſon's Caſe, Dyer 81, and Henningham's Caſe, Dyer 344. where the Judgment paſſed by Nihil dicit, ſo that the ſaying in Plow. 440. a. that what way ſoever the Heir be condemned in Debt, if he do not confeſs the Aſſets, &c. that it ſhall be his proper Debt, is now taken for Law.

And I alſo hold, that if the Heir plead falſly, and there is found more Aſſets, that yet it is in the Election of the Plaintiff to charge him, and to take Execution of the Aſſets only, or to take an Elegit of all his Land, and he is not bound to take an Elegit of all the Land in this Caſe, for otherwiſe inconvenience may ariſe: If the Heir hath an hundred Acres by Deſcent, and two by Purchaſe, if upon the falſe Plea of the Heir the Plaintiff cannot have any other Execution but an Elegit of the Moyety of his Lands, then he by this is prejudiced, for otherwiſe he might have all the Aſſets in Execution, and ſo the Heir by this way ſhall take advantage of his falſe Plea. 3. He held as Whitlock before, and for the ſame reaſon Doderidge Juſtice: How the Heir ſhall be bound by the Act of his Father, is worthy of Conſideration, upon which Prima facie the Books ſeem to diſagrée, but being well conſidered, accord with excellent Harmony. I have conſidered this Caſe, it was moved at Reading Term, and becauſe my Notes are not here, I will ſpeak more briefly, and will conſider,

Where upon a falſe Plea by an Heir, the Plaintiff may elect to take the Aſſets in Execution or an *Elegit* of all his Land.

1. How an Heir ſhall be charged upon the Obligation of his Father: and as to that in Debt againſt an Heir, he is charged as Heir, ſo that at this day it is taken as his proper Debt, whereby the Writ is in the Debet and Detinet, but in the Detinet only againſt Executors: But in former time from the 18th of E. 2. till 7 H. 4. if an Executor had Aſſets, the Heir was not chargeable, but in 7 H. 4. the Law changed in this Point, for now it is accounted his own Debt, and Debt will lie againſt his Executor, as it is ſaid in Plow. Com. and ſo againſt the Heirs of the Heir to many Generations, albeit of this Plowden makes a doubt, and his Plea that he had nothing at the day of the Writ purchaſed, nor ever after, is good, for if he alien the Aſſets he is diſcharged of the Debt, in regard he is not to wait the Action of the Obligée.

How an Heir ſhall be charged upon the Obligation of his Father.

2. The Heir ſhall be charged upon the Recognizance, not as Heir, but as Ter-tenant, for he is not bound in the Recognizance, but only the Conuſor grant that the Debt ſhall be levied of all his Lands and Tenements, but not againſt his Heirs. And here he is not merly as Ter-tenant, for he ſhall not have Contribution againſt other Ter-tenants, but only againſt thoſe who are Heirs as himſelf is, but to all other intents he is Ter-tenant, and ſo charged, as 32 E. 3. and 27 H. 6. are.

Why an Heir is not chargeable for Debt after he hath ſold the Aſſets.

3. That upon a Judgment (as our Caſe is) the Heir ſhall be charged as Ter-tenant and not otherwiſe: The Book which hath been cited, viz. 33 E. 3. Execution 162. is expreſs in the point; the broken years of Fitzherbert are obſcurely reported, but by comparing of Caſes it will appear to be our Caſe expreſly.

4. That albeit an Heir ſhall be charged upon the Obligation of his Anceſtor, where he is particularly bound, yet upon his falſe Plea no Execution ſhall be but upon the Aſſets: So it ſeems to me that in the principal Caſe the Judgment ſhall be ſpecial, and it ſeems to be a very plain Caſe.

Crew Chief Juſtice agréed, and in his Argument he affirmed what Jones ſaid, that a general Judgment ſhall not be given againſt the Heir, if he do not plead falſly that he hath no Aſſets, and not upon Nihil dicit: And ſo Judgment was given that the Plaintiff ſhall have Execution of the Moyety of the Lands deſcended to the Defendant; and ſo note the diverſity of Debt againſt the Heir, and Scire facias againſt the Heir.

Hill. 1 Car. *In the King's Bench*, Intr. Hill. 18. Jac. Rot. 189.

Dickenſon *verſus* Greenhow.

IN an Attachment upon a Prohibition, the Plaintiff declared that where Robert the laſt Abbot of Cokerſham in Lancaſhire, was ſeiſed in Fée of three Acres of Land, parcel of his Monaſtery, and that the Abbot and his Com-monks, and all the Predeceſſors of the Abbot were time out of mind of the Order and Rule of Præmonſtratenſes, and that the Order of Præmonſtratenſes, and all Monks thereof, were time out of mind diſcharged of payment of Tythes for their Lands and Tenements, Quamdiu manibus propriis aut ſumptubus excolebant. And that the ſaid Abbot and all his Predeceſſors time out of mind had holden the ſaid three Acres diſcharged of payment of Tithes, Quamdiu, &c. and ſo held them until the diſſolution of the Monaſtery, and ſhew the Surrender to H. 8. and the Statute of 31 H. 8. by force whereof H. 8. was ſeiſed, and held them diſcharged, and from him derive them to E. 6. and from E. 6. to Quéen Mary, and from her to Quéen Elizabeth, and from her in the 42d year of her Raign to Wagſtaff, and from him by mean Conveyances to Dickenſon the Plaintiff, Quorum pretextu he was ſeiſed, and enjoyed them in Propria manurantia, and ſhew the Statute of 2 E. 6. cap. 15. whereby it is enacted that Tythes ſhall be payed as uſually they were, &c. Quorum pretextu, the Plaintiff held the three Acres diſcharged of Tythes, and that notwithſtanding, and againſt the Prohibition, the Defendant did draw him into Plea for them in Court-Chriſtian, and the Judge thereof held Plea, and the Defendant did there proſecute him to the Diſinheriſon of the Crown: And upon this the Defendant demurred, and prayed a Conſultation. And Sir John Davies the King's Serjeant argued for the Defendant, that a Conſultation ſhould be granted, becauſe that his matter of diſcharge is double.

1. His Privilege. 2. The Preſcription: and if either of them will not help him, then he ought to be charged: For the Privilege, he took it that the Præmonſtratenſes never had ſuch a privilege. It is a Maxim in Law, that all Perſons ought to pay Tythes, and all Lands ſhall be charged with them of common Right; but alſo there are divers Diſcharges of them and allowed by our Law (as is manifeſt by the Orders of Templers, Hoſpitalers and Ciſtertians, which Diſcharges our Law allows) and theſe are, 1. By Preſcription. 2. By real Compoſition. 3. By Privilege obtained, and that by two ways.

All Lands chargeable with Tythes.

1. Either by the Bull of the Pope, for he taking upon himſelf to be the great Diſpenſer and Steward of the Church, took upon him to diſcharge them, but this (as it is holden by the Canon) he could not abſolutely do, but might divert them to a Clergy-man, or grant to another to hold them by way of Retainer, and this ought to be to a Clergy-man alſo. Or,

2. By a general Council, for ſome Orders were diſcharged by General Councils: So ſome obtained Privileges by the Pope's Bulls, which are his Patents, ſome by Councils which are his Statutes, and Decrées were as Judgments, but yet none of them had ever any force in our Law, nor did bind us in England more than voluntarily retained and approved by uſage and cuſtom, for as it is ſaid in 11 H 4. the Pope cannot alter the Law of England, and this is evident, for in all Caſes where the Bulls or Conſtitutions of the Pope croſs the Law of the Land, they have always bén rejected; as for inſtance,

The Pope's Bulls of four ſorts.

1. In the Bulls which are of four ſorts.
1. Of Proviſion.
2. Of Citation.

3. Of

3. Of Exemption. And 4. Of Excommunication. And as for thoſe of Excommunication, it appeareth that it was Treaſon at Common Law, and that the Treaſurer did knéel to E. 2. for one who brought them in, and in the perpetual courſe of the Books afterwards, they have always bèn diſallowed in Pleas. So his Bulls of Citation, before the Statute of Proviſion was an hainous Offence, and ſo are Bulls of Proviſion and Exemption. For his Canons, where they were againſt the Law they were neglected. It appeareth by the Canon, Quod nullus capiat beneficium a Laico, and yet notwithſtanding continued long after for Benefices, and does yet for Biſhopricks, that the Clergy ſhall take them from the King and a Lay-hand: And alſo there is a Canon for Exemption of Clarks out of temporal Juriſdiction: but yet as Brian ſaith, 10 H. 7. 18. it was never obſerved here. So that Canon ſaith, that the time of the Laps ſhall be accounted Per ſeptimanas, but our Law not regarding this, ſaith, that it ſhall be accounted Per menſes in the Calender, as it is expreſly adjudged in 5 E. 3. Rot. 100. Rot. clauſ. in turri: And there is a great reaſon for it, as it is in 29 H. 3. memb. 5. in turri. It is not neceſſary for Biſhops of England to go to general Councils; ſo as in Parliament thoſe that do not ſend Knights or Burgeſſes ſhall not be bound by Statutes. And the Councils of Lyons, of Bigamis, &c. are expounded by Statutes how they ſhall be taken; ſo that if they have a Privilege (as in truth they have) by the Pope's Bulls, if it were not allowed in England, they are not of force to privilege them againſt the Common Law of the Land for payment of Tythes; but this was never here allowed.

And now for the Preſcription this cannot help them, for Monks are not of Evangelical Prieſthood, to wit, capable of Tythes in the Pernancy, but mèrly Lay-men, and then as the Biſhop of Wincheſter's Caſe is, they cannot preſcribe in non decimando; And Bede ſaith of them, that they are Mere laici, ſo that if their Privilege were allowed, the Preſcription would not help them. The Privilege of Præmonſtratenſes was by the Council general of for their Diſcharge, which denies that all Religious Perſons ſhould be diſcharged of Tythes of Lands in their own hands, Quamdiu, &c. But afterwards Adrian reſtrained it to the Templers, Holpitalers and Ciſtertians, omitting the Præmonſtratenſes; and the Decrée of Adrian was received alſo, whereby the Law took notice of the diſcharge of the ſaid three Orders. True it is, that the Præmonſtratenſes have a Bull of Pope Innocent the Third, of Diſcharge, and as large Liberties as the Ciſtertians, but they never put this in ure: And it ſeems, 1. That there were of them twenty nine Abbots and Abbies, and yet their Privilege is not mentioned in all the Books as the Ciſtertians is. 2. They complained to Gregory the Ninth, that they were not ſuffered to put it in ure, and notwithſtanding this Complaint and Command of the Pope to the Clergy to allow them this Privilege, yet 24 H. 3. Complaint was made againſt them in Parliament for claiming this Privilege: But the Statute of 2 H. 4. cap. 4. put this out of doubt, for this put the Ciſtertians in a præmunire, for purchaſing and putting in Execution Bulls of Exemption of their Lands purchaſed afterwards.

Now if the Præmonſtratenſes had the ſame privilege they ſhould not have bèn omitted out of this Statute; then comes the Statute of 7 H. 4. cap. 6. which terrifies all from putting in Execution Bulls of Exemption of their Lands not put in Execution before, upon which it is not to be preſumed that it was put in Execution afterwards.

But admit that the Præmonſtratenſes had this privilege: I ſay, that the Plaintiff hath not applied this Privilege to himſelf, for he hath not averred in fact that at the time, &c. Propriis manibus excolebat, nec ad firmam demittebat; And this he ought to have done if he would take advantage of the Privilege, as in Dickenſon's Caſe, Novel lib. intr. 542. there it is expreſly alledged

leaged in the like Caſe, as ours is here, and where the ſame Priviledge as here is claimed, Quod manibus propriis excolebat.

True it is that it is ſaid here, that after the Feoffment to him made, he was ſeiſed Et gaviſus fuit in propria manuten. but he doth not ſay, that at the time of the Tithes due, gaviſus fuit, &c. as he ought expreſly to have done, as appeareth by other Caſes.

If one preſcribe to have Common in Arable Land when the Corn is reaped, or in Meadow where the Hay is carried away, and juſtifie by reaſon thereof he ought to aver that the Corn or Hay was carried away when he put in his Cattel, otherwiſe he hath not applied the Preſcription to himſelf.

So if one juſtifie for Common Quandocunque averia ſua venerint, he ought to aver that his Cattel then went in the place where, &c. as 17 Aſſ. 7. So if the King pardon all but thoſe who adhere to M. he who pleads it ought to aver that he did not adhere to M. ſo here the priviledge is Quamdiu propriis manibus, &c. and therefore at the time he ought to aver that he had it propriis manibus, &c.

Alſo where upon the Surrender to H. 8. and the Statute, they conclude that the Queen held it diſcharged, this cannot be, for this ought to be in ſuch manner as the Abbot held it diſcharged, but this was quamdiu, &c. and the King cannot be bound to ſuch an unbeſeeming Condition, and therefore he ſhall hold it diſcharged: Like to the Caſe where the Abby hath the Preſentation, and another the Nomination, the Abby Surrender, he who hath the Nomination ſhall have all, for the King ſhall not preſent for him, it being a thing undecent for His Majeſty, and ſo he concluded for the Defendant.

Banks contra. 1. That it is a good cauſe of Prohibition. 2. That it is well applied to us.

1. That the Order of Præmonſtratenſes is diſcharged of Tythes, that they had once this priviledge, hath been allowed by the other Party, by the Bulls of the Pope, and that it was allowed and taken notice of, he proved by this that this Bull was confirmed by King John in the 24th year of his Reign, the Charter whereof he ſaid he had under Seal, and 22 E. 1. membran. 5. there were 26 Abbies of this Order, and the King took them all into his Protection with their Immunities, and 22 R. 3. John de Gant having Jura Regalia in Lancaſhire (where the Abby is) confirmed to them this Bull, and alſo this hath been divers times allowed and decreed to them in Court Chriſtian for Suit of Tythes, as in the Caſe of the Abby of Bigham which was of the ſame Order.

And as to that which was objected, that if the Præmonſtratenſes had ſuch a priviledge as the Ciſtertians in 2 H. 4. that the like proviſion would have been againſt them.

As to this I anſwer, that ſuch a Proviſion is not againſt the Templars nor Hoſpitalers, and yet they have ſuch a privilege.

2. It may be that they never enlarged their Privileges above their Grant. And for the Statute of 7 H. 4. our Privilege was not then new, and it was afterwards allowed in 22 R. 2. And alſo I conceive, that if the Abby were diſcharged at the time of the Diſſolution, although not De jure, yet this is a ſufficient Diſcharge within the Statute of 31 H. 8. as it is taken, Coke, lib. 11. 14.

2. I hold that they may here preſcribe to be diſcharged of Tythes, becauſe they are Spiritual Perſons, and capable of Cure of Souls, and capable of Tythes in Perpetuity, as if an Appropriation be made to them.

3. It is not now to be argued, whether they have ſuch a Privilege, for they have demurred, which is a Confeſſion of all matters in Fact, &c.

4. If there be a matter whereupon the Prohibition may be grounded it will ſerve, vide Dyer 170, 171. Co. lib. 10, 11.

And

And 5. The Privilege is well applied, becauſe it is ſhewn that they were once diſcharged.

6. He needs not to ſhew how he is diſcharged, 22 E. 4. 4. 5 E. 4. 8. 20 E. 4. 15. Alſo the Diſcharges are temps dont, &c. and therefore not pleadable; ſo he prayed that the Prohibition might ſtand.

Paſch. 1 *Car.* In the *King's Bench.*

Bowry *verſus* Wallington.

NOte that in this Caſe upon the Statute of 50 E 3. 4. it was agreed by the Court, that if there be a Suit in the Eccleſiaſtical Court, and a Prohibition awarded, and afterwards Conſultation granted, that upon the ſame Libel no Prohibition ſhall be granted again, but if there be an Appeal in this Caſe, then a Prohibition may be granted, but with theſe differences.

Where ſeveral Prohibitions may be granted in the ſame Caſe, and where not.

1. If he who appeals pray the Prohibition, there he ſhall not have it; for then Suits ſhall be deferred in infinitum, in the Eccleſiaſtical Courts.

2. If the Prohibition and Conſultation were upon the Body of the matter and the ſubſtance of it, for otherwiſe he ſhall be put many times to try the ſame matter, which is full of veration. And the Caſe was moved again, and argued by Noy, which was thus.

Wallington libelled in the Eccleſiaſtical Court againſt Bowry for Tythes of Wool and Lamb, and Bowry upon ſuggeſtion of a Modus decimandi obtained a Prohibition, and had an Attachment, and declared upon it, and are at Iſſue upon the Modus, which is found for the Defendant, and Conſultation granted, whereupon Judgment was given in the Eccleſiaſtical Court againſt Bowry, upon which Bowry appealed, and prayed a new Prohibition, and had it, and Noy moved for a Conſultation. 1. Becauſe that a Prohibition and an Attachment upon it are but one Suit, for the Contempt of the Party in bringing his Suit in another Court, and tranſlating this from the King's Court, and when it is once tried for the Defendant, the ſame thing ſhall not be tried again. And as to the Statute of 50 E. 3. 4. upon the miſtake whereof the miſtake is raiſed, he confeſſed that the printed Books, and alſo in the Extract of the Parliament, one Roll remaining in the Tower is (the ſame Judge) but the Parliament-Roll it ſelf, and the Petition is, Liceatque Judici Eccleſiaſtico ſive dioceſſ. eidem an hujuſmodi, and the Anſwer to the Petition is, one Conſultation granted ſufficeth in this Caſe: And the Parliament-Roll it ſelf was brought into the Court and viewed, but he ſaid, that if it were as it is in the printed Book and Extract, the ſame Judge ſhall not be intended the ſame perſonal Judge, but the ſame Judge of Conuſance of the ſame Juriſdiction or Cauſe, for otherwiſe, if another Commiſſary be made, as the Biſhop may when he will, his Succeſſor may be newly prohibited, and alſo one thing may be infinitely tried, for in many places the Suit begins in the Arch-deacon's Court, and from him an Appeal may be brought to the Biſhop.

The

The ſame Term in the King's Bench.

Pack *verſus* Method *in a Writ of Error.*

IN Mich. Term, 22 Jac. Method brought an Action upon the Caſe in the Common Pleas againſt Pack, and declared that in conſideration that the Plaintiff would pay to Playford 52 l. 14 s. to the uſe of the ſaid Pack, ſuch a day, &c. Pack promiſed to deliver to him his Bond (in which he was bound to him in the ſaid ſum) when he ſhould be thereunto requeſted: And ſhews that he had paid, &c. and the Defendant did not deliver to him the Bond, albeit the ſame to do he was afterwards often times requeſted, and upon Non aſſumpſit pleaded, it was found for the Plaintiff, and now it was moved in Arreſt of Judgment, becauſe the Requeſt is not laid ſpecially, nor the day nor place thereof expreſſed. But the Court, to wit, Hobart Chief Juſtice, Hutton and Harvey gave Judgment for the Plaintiff, and yet they agreed, that if he had demurred upon the Declaration, it had not been good, and alſo that if it had been general, Licet ſæpius requiſit, it had not been good, in as much as it is parcel of the Promiſe, and therefore ought to be laid ſubſtantially; viz. That it was after the promiſe and payment of the 52 l. but the time is ſupplied by theſe words Poſtea, and there is no defect but in the place, and (Poſtea) implies that it was after the promiſe and payment.

And Hobart ſaid, that all the Points of the Declaration which have matter and ſubſtance are good, only there wants the place where the Requeſt was made, which by the Iſſue is moved, and the Requeſt is here well notified to the Court, and the defect of the place is now helped by the Statute.

Hutton ſaid, that if the promiſe had been to pay ſo much upon Requeſt at Eaſter, there the day ought to have been ſhewn, and (Poſtea) had not been ſufficient, but here the Poſtea refers only to a thing whereby it is certain; and he ſaid, that upon this Iſſue ſuch a Requeſt ſhall be given in Evidence.

Harvey ſaid, that the Requeſt being here laid as it is, the Court may well give Judgment: And it ſeemed to Hobart that ſuch a Requeſt cannot be given in Evidence where the Iſſue is upon an Aſſumpſit: And Judgment was given for the Plaintiff; and afterwards a Writ of Error, Hill. 1 Car. was brought in the King's Bench, and the Opinion of the Court was ſtrongly, that the Plaintiff ought to have alledged the Requeſt ſpecially and certainly in time and place, becauſe it is traverſable and parcel of the Aſſumpſit, and not to be done but upon Requeſt.

Where in an Action upon the Caſe, there ought to be a ſpecial Requeſt, and where not.

Jones Juſtice remembred divers Preſidents in the Point, and further day was given to bring in Preſidents of either ſide, and two Preſidents were produced according to the Opinion of this Court, Scil. Paſch. 30 Eliz. Rot. 464. in 1. Court, Old and Eſtgreen's Caſe, Trin. 16 Jac. Rot. 268. Wales Caſe.

But in Debt Licet ſæpius requiſit is ſufficient, for it is not material nor traverſable, for the bringing of the Action of Debt (which is a Precipe) is a ſufficient demand in it ſelf, and afterwards at another day the Court continued of the ſame Opinion, and therefore the Plaintiff in the firſt Action brought a new Action, Quod nota, for albeit the Defendant had pleaded Non aſſumpſit, and Iſſue was joyned upon it, yet this did not amend the evil laying of the Requeſt, according to the Preſidents abovelaid.

Paſch.

Paſch. 2 Car. *In the King's Bench*, Intr. Hill. 1 Car. Rot. 135.

Conſtable *verſus* Clobery.

IN an Action of Covenant, the Queſtion was upon the Traverſe; the Plaintiff declared upon the Indenture of Covenant, and the Covenant was that a Ship ſhall go with the next fair Wind, and that the Merchant ſhall pay ſo much for Fraight: the Defendant ſaith by way of Traverſe, that he did not go with the next Wind, and it was objected by Stone of the Temple, of Council with the Plaintiff, that the Traverſe was not good, but he ought to have traverſed that the Ship did not go at all, for that which is material ſhall be traverſed, and that the Ship did not go is the moſt material thing here, and this appeareth by 15 E. 4. 2. where a Gift in Tail is traverſed, and not the death of the Tenant in Tail, 19 H. 8. 7. 36 H. 6. 16. 2 H. 5. 2. 2 H. 7. 12. and there are Caſes to this purpoſe, Co. lib. 73 b. Ughtred's Caſe: If a Man entitles himſelf to Land by an Eſtate which cometh by Condition, he ought to ſhew that the Condition is performed: A Covenant againſt a Covenant will not make an Eſtoppel, but he ſhall bring his Action, 3 H. 6. 33. Where he ought to ſhew that he went to Rome, becauſe it is a precedent Condition: The principal Caſe in Ughtred's Caſe prove other, to wit, that which is material is alledgable: And the difference upon the Caſe of 48 E. 3. 3. 4. Where A. Covenant with B. to reſerve him with three Eſquires in France, and B. covenant for to pay him 42 Marks, he may chuſe to covenant in general or ſpecial, as he will, for there was Covenant againſt Covenant, and here there is a Covenant of one part to go with the Ship, and on the other part to pay ſo much for the Fraight, and ſo Covenant againſt Covenant.

And it ſeemed to Doderidge Juſtice, that the Traverſe is not good, for the Traverſe here is by permiſſion of God.

And for another thing where Merchants covenant to pay joyntly and ſeverally, according to the quantity of the Wares, there an Action of Covenant may be brought againſt one alone, for the Deed is ſeveral.

And by Crew Chief Juſtice, it cannot be a good Traverſe, for a Circumſtance cannot be traverſed, for Wind is alterable, and a thing material is only traverſable, and here the Covenant is ſeveral for their ſeveral Fraights, and it may be that others have paid him.

Jones Juſtice, the Traverſe is not good; and for the other matter he cited Matthewſon's Caſe, Co. lib. 5. 22. Where upon a Charter-party if one Seal be broken all is gone. If three are bound joyntly, and an Action is brought againſt one, and it appeareth that others have ſealed, the Writ ſhall abate: But in this Caſe an Action lies againſt him alone, although the other be named in the Indenture.

The ſame Term in the ſame Court, Int. Hil. 22 Jac. Rot. 1019.

Mitten *verſus* Faudrye.

AN Action of Treſpaſs was brought for chaſing of Sheep, the Defendant pleaded that they were treſpaſſing upon certain Land, and he with a little Dog chaſed them out, and as ſoon as the Sheep were out of the Land he called in his Dog, and upon this the Plaintiff demurred; The Point ſingly

Juſtification in Treſpaſs.

was but thus; I chaſe the Sheep of another out of my Ground, and the Dog purſues them into another Man's Land next adjoyning, and I chide my Dog, and the Owner of the Sheep brings Treſpaſs for chaſing of them: And it was argued by Whiſtler of Grays-Inn, that the Juſtification was not good, and he cited Co. lib. 4. 38. b. that a Man may hunt Cattel out of his Ground with a Dog, but cannot exceed his Authority, and by him an Authority in Law which is abuſed is void in all, and to hunt them into the next Ground is not juſtifiable. The Books differ, if Cattel ſtray out of the high Way involuntarily, whether Treſpaſs lies, 7 H. 7. 2. and H. 7. 20. but all agree, that they ought to be chaſed out as gently as may be.

Littleton argued for the Defendant, that Cattel may be chaſed out into another Man's Ground, and he ſaid that a Man cannot have ſuch a power upon his Dog as to recall him when he pleaſeth, and a Dog is ignorant of the bounds of Land, and he reſembled this Caſe to other Caſes of the Law; firſt to 21 E. 4. 64. In Treſpaſs of Cattel taken in A. in D. the Defendant ſaith, that he was ſeiſed of four Acres called C. in D. and found the Cattel there Damage feaſant, and chaſed them towards the Pound, and they eſcaped from him and went into A. and he preſently drove them, which is the ſame Treſpaſs, and admitted for a good Plea: and 22 E. 4. 8. In Treſpaſs the Defendant juſtifies by reaſon of a Cuſtom that they which plough may turn their Plough upon the Land of another, and that for neceſſity, and it was allowed for a good Juſtification, and he hath more government of his Oxen, than in our Caſe he can have of his Dog.

If a Man be making of a lawful Chaſe, and cannot do it without damage to another, this is Damnum abſque Injuria, 21 H. 7. 28. And he cited a Caſe which was in Mich. 18 Jac. between Jenning and Mayſtone, where a Man of neceſſity chaſed Sheep for taking one of his own, in Treſpaſs he may juſtifie it: And alſo if a Dog goes into the Land of another (as in this Caſe) Treſpaſs does not lie, but other wiſe it is of Cattel.

Crew Chief Juſtice, it ſeems to me that he might drive the Sheep out with the Dog, and he could not withdraw his Dog when he would in an inſtant, and therefore it is not like to the Caſe of 38 E. 3. Where Treſpaſs was brought for entring into a Warren, and there it was pleaded that there was a Pheaſant in his Land, and his Hawk flew and followed it into the Plaintiff's Ground, and there it ſeems that it is not a good Juſtification, for he may purſue the Hawk, but cannot take the Pheaſant, 6 E. 4. 8. Man cuts Thorns, and they fell into another Man's Land, and in Treſpaſs he juſtified for it; and the Opinion was, that notwithſtanding this Juſtification Treſpaſs lies, becauſe he did not plead that he did his beſt endeavour to hinder their falling there, yet this was a hard Caſe; But this Caſe is not like to theſe Caſes, for here it was lawful to chaſe them out of his own Land, and he did his beſt endeavour to recall the Dog, and therefore Treſpaſs does not lie.

Doderidge Juſtice agreed, for here was no Default, and when he ſaw them out of his own Ground, he rated the Dog, 12 H. 8. this difference is taken, if I ſee Sheep in my Land, I may chaſe them out; but if another ſees them, and chaſe them out, I may have Treſpaſs againſt him, becauſe he hath taken away my advantage; and the nature of a Dog is ſuch that he cannot be ruled ſuddenly, and here it appeareth to be an involuntary Treſpaſs, 8 E. 4.

For an involuntary Treſpaſs Action doth not lie.

A Man is driving Oxen through a Town, and one of them goes into another Man's Houſe, and he follows him, Treſpaſs doth not lie for this, becauſe it was involuntary, and a Treſpaſs ought to be done voluntarily, and ſo it is Injuria, and a hurt to another, and ſo it is Damnum.

If Deer be out of a Foreſt, the Owner of the Land where they are may hunt them, and if the Deer flee to the Foreſt, and the Hounds purſue him, then he ought to call in the Dogs, and ſo I may juſtifie, and Treſpaſs lies not.

In the time of Chief Juſtice Popham, this Caſe was adjudged in this Court.

Treſpaſs

Treſpaſs was brought for hunting and breaking of Hedges, and the Caſe was, that a Man ſtarted a Fox in his own Land, and his Hounds purſued him into another Man's Lands, and it was holden that he may hunt and purſue him into any Man's Land, becauſe a Fox is a noyſome Creature to the Common-wealth.

Bracton ſaith, that when a Man is out-lawed he hath Caput lupinum, and he may be hunted through all the County: And he agréd the Caſe of 8 E. 4. If a Tréé grow in an Hedge, and the Fruit fall into another Man's Land, the Owner may fetch it in the other Man's Land, and he alſo agréd the Caſe of 22 E. 4. 8. of the Plough, and ſo concluded that the Treſpaſs doth not lie.

Jones Juſtice, that the Treſpaſs doth not lie, vide Co. lib. 8. 67. Crogate's Caſe, and lib. 4. Terringham's Caſe, and he cannot recall his Dog in an inſtant: And the ſame day Judgment was given for the Defendant, Quod querens nil capiat per billam.

The ſame Term in the ſame Court.

Marſh *verſus* Newman.

IN a Replevin the Defendant pleaded that was ſeiſed in jure Collegii, and doth not ſay that he was in Dominico ſuo ut de fœdo, and the Plaintiff demurred upon the Avowry. And Andrews argued for the Plaintiff.

1. The Defendant ought to have alledged certainly that they were ſeiſed in Fée; for Littleton ſaith, that in Counts and Pleadings a Man ought to ſhew how he is ſeiſed, 8 E. 3. 55. 13 Eliz. Dyer 299. Pl. 31. An Inquiſition was found upon an Extent of a Statute-merchant, and doth not ſhew how the Conuſor was ſeiſed, but only that he was ſeiſed, and the Inquiſition holden void. But it may be objected that if Land be given to a Dean and Chapiter that they have Fée, 11 H. 7. 12. I confeſs it: But the conſtant uſe of pleading hath always béen in caſe of a Biſhop, College, &c. to ſay, that they were ſeiſed in Fée, as appears in Hill and Grange's Caſe, and Co. lib. 6. the Dean and Chapiter of Worceſter's Caſe, and Co. lib. 11. 66. Magdalen College Caſe; and it appeareth by 20 H. 7. in the Abby of S. Auſtin's Caſe, that an Abby may have a Leaſe Pur auter vie, and ſo perhaps here the Dean had a Leaſe but Pur auter vie, and therefore ought to have alledged that he was ſeiſed in Fée, if the truth were ſo. And he moved other Exceptions, as 1. That the Defendant entitled himſelf to a Leaſe as Executor, and doth not plead Literas teſtamentarias.

2. That the Defendant entitles himſelf to a Rent, part of which was due in the time of the Teſtator, and part in his own time, and doth not ſhew when the Teſtator died, and therefore the Avowry not good.

Jermy for the Defendant that the Avowry is good, and it cannot be otherwiſe intended but that they are ſeiſed in Fée, 11 H. 7. Lands given to a Paſtor and Commonalty is Fée-ſimple, but otherwiſe of an Abbot and Parſon, Plow. 103. and Dyer 103. A Seiſin in Fée is implied by Seiſin In jure Collegii; and becauſe it hath been objected, that he may be ſeiſed Pur auter vie, this is but a Foreign Intendment, for a Fée is always intended Seiſin in Fée-ſimple.

For the ſecond Objection, becauſe Non profert literas teſtament. true it is if he entitle himſelf meerly as Executor, he ought to bring in Literas teſtamentar. but our Caſe is not ſo, for here we are Defendants, and we endeavour

only to excuſe a Tort, 36 H. 6. 36. Where a Man is Plaintiff he ought to ſhew Literas teſtamentar. that ſo the Court may ſee that he hath cauſe of Action, but here it is only by way of Excuſe.

For the third, that the death of the Teſtator doth not appear is not material, for if any part be due to him, it is due as Executor.

Doderidge, they ought to have pleaded that they were ſeiſed in Fée; true it is, that Land given to a Mayor and Commonalty is Fée-ſimple, and the reaſon is becauſe they are perpetual, and if the Eſtate be not limited, they ſhall take according to their Continuance, 11 H. 4. 11 H. 7. and 27 H. 8. Dockray's Caſe, they may be ſeiſed Pur terme dauter vie, but if they had pleaded that they were ſeiſed to them and their Succeſſors, this pleading is good, Prima facie, 17 E. 3. 1.

Crew Chief Juſtice, all the Authorities are that they were ſeiſed in Fée, In jure Collegii, and it is not good to admit a new way of pleading.

Jones Juſtice, Tenant Pur auter vie makes a Leaſe for years, and ceſtui que vie, dies, he cannot have an Action of Debt againſt Leſſee for years, for he is now Tenant at ſufferance. But for the firſt Point, it ſeems to him that the pleading is not good, for although in point of Creation, they take a Fée by a Gift to Dean and Chapiter, yet in pleading they ought to alledge their Eſtate ſpecially, for they may have an Eſtate Pur auter vie: And this is in an Avowry which ſhall be taken ſtrictly. And by Crew Chief Juſtice the Defendant here ought to ſhew Literas teſtamentar. for he is an eſpecial Actor in the Avowry. And by Doderidge, Longiſſimum vitæ tempus eſt 100 years, Co. lib. 10. 50. Lampet's Caſe, and therefore in pleading, if the Defendant had ſaid, that a Dean and Chapiter were ſeiſed, and made a Leaſe for 100 years, this implies a Seiſin in Fée, becauſe a Man cannot have ſo long a Life, but here the Leaſe is but for 89 years, and it is common to let for 89 years, if A. ſhall ſo long live, yet this is but a ſlip, and the Title is apparent.

The ſame Term in the ſame Court.

Hodges *verſus* Moore.

IN Debt for Marriage-Money, the Caſe was this: A Man was bound to Hodges to pay him a 1000 l. after that he had married his Daughter, and afterwards he married her, and brought Debt upon this Obligation, and it was not averred that he had given notice to him of the Marriage, but demanded the Money: And this was moved by Noy in Arreſt of Judgment (but quære if requeſt afterwards doth not imply notice.)

Where notice is requiſite before Action, and where not.

And Doderidge Juſtice put this Caſe, A Man is bound to pay an 100 l. two months after A. return from Rome, he ought to give notice of his Return before he can have an Action upon this Obligation, for he may land at Newcaſtle, or Plymouth, where by common intendment the Obligor cannot know whether he be returned, or not; and this was agreed by the Chief Juſtice and Jones.

And Serjeant Davies argued for the Plaintiff, that there need not preciſe notice to be given, and he cited 1 H. 7. 18 E. 4. and Co. lib. 8. Where the Obligor ſhall take notice at his peril, and ſo here becauſe he takes upon him for to pay it: And it was ſaid, that one Blackamore's Caſe was adjudged in the point, and he conceived alſo that this requeſt afterwards is a ſufficient notice. But Noy for the Defendant ſaid, that he ought to give notice, or otherwiſe this miſchief would enſue, that if he had not married her, and yet had demanded the Money he ought to pay it: and he ſaid, that where an Act is to

be

be done by a Stranger, the Plaintiff or Defendant ought to take notice thereof at his peril, as the Case E. 4. where a Man was bound to ſtand to the Award of J. C. he ought to take notice of the Award at his peril: but where it lies properly in the Conuſance and notice of the Plaintiff, there he ought to give notice thereof to the Defendant, Co. lib. 5. Mallory's Caſe: If a Reverſion be bargained and ſold to J. S. the Bargainee ſhall have the Rent without Attornment; but if a Penalty be to be forfeited, he ought to give notice to the particular Tenant of the Grant, or otherwiſe he ſhall not take advantage thereof: and he cited a Caſe which was in 17 Eliz. Stephen Gurney's Caſe; Leſſee for years, the Reverſion is granted over for years by way of future Intereſt, to begin upon the death, forfeiture or determination of the firſt Leaſe; provided that if the Rent upon the ſecond Leaſe be Arrear, that the Leſſor may enter; the firſt Leſſee ſurrender, a Rent-day incur, the ſecond Leſſee doth not pay the Rent, the Leſſor ſhall not enter for a Forfeiture, becauſe the firſt Leaſe determined by an Act which lies properly in the Conuſance of the Leſſor, and becauſe he was to take advantage by it, he ought to have given notice thereof to the Leſſee, and here he might have well given notice to the Defendant, for it lies properly in the Conuſance of the Plaintiff.

The ſecond Objection was, that here was an implied notice, becauſe the Marriage was at the inſtance of the Defendant, which implies a notice.

Under favour this is no notice, for this is before the Marriage, but if no notice be given after the Marriage, then there is no notice.

But by Serjeant Davies, there is a ſufficient Implication, and there is no need of notice in our Caſe; and ſee Co. lib. 8. Francis his Caſe, where they ought to take notice at their peril, and a Marriage is an Eccleſiaſtical Judgment of which he ought to take notice, and he was interrupted, for all the Juſtices went to the Parliament. And divers precedents were cited, that there need no notice to be given in this Caſe: And it was agreed that Judgment ſhould be given for the Plaintiff: And in Trinity Term next following, Judgment was accordingly given for the Plaintiff.

The ſame Term in the ſame Court.

Sir George Reynoll's *Caſe.*

SIR George Reynoll Marſhal of the Marſhalley of the King's Bench, brought Debt upon a Bond, the Condition whereof was, that the Defendant ſhall be a true Priſoner, and it was doubted whether the Bond were within the Statute of 23 H. 6. cap. 10. What Bonds a Sheriff or Marſhal may take.

Doderidge, it is not to be underſtood by this Statute that a Sheriff, Goaler or Marſhal ſhall take no Bond, for if the Marſhal hath a Man in Execution, and fear that he will eſcape, and he takes Bond of him, this Bond is good.

Jones, The intent of the Statute, that the Sheriff or Marſhal ſhall not ſuffer Priſoners, to go at large, for that is within the Statute.

And it was ruled in the King's Bench, that the Marſhalſey ſhould be enlarged, and this ſhall be called within the Rule, and if the Marſhal take a Bond to tarry there it is good, but if he ſuffer him to go at large, it is not good. Within the Rules of *B. R.* what it is.

The

The ſame Term in the ſame Court, Intr. Hill. 1 Car. Rot. 124.

Sury *verſus* Albon Pigot, *and three other Defendants.*

IN an Action upon the Caſe for ſtopping his Water-courſe, the Plaintiff declares that 14 Octob. 22 Jac. he was poſſeſſed of the Rectory of M. in Barkſhire, of which a Curtilage was parcel, and that in this Curtilage is and hath been time out of mind a Watering-place, for the watering of the Cattel of the Plaintiff and others, and for other neceſſary uſes, and that a certain Water-courſe had time out of mind flowed from Mildford Stream to this Curtilage, and that this Water filled the ſaid Pond; and further that the Defendant well knowing this, and intending to dam up the ſaid Watering-courſe built a Stone-wall thereupon whereby the Water-courſe was ſtopt up, to the Plaintiff's damage of 20 l. and this was laid with a Continuando. The Defendant pleaded that 3 H. 8. the ſaid H. 8. was ſeiſed of the Manor of, &c. and of the ſaid Rectory in his Demeſnes of Fee, and of a certain piece of Land called the Hop-yard, lying between the ſaid Watering-place and the ſaid Stream, and by his Letters Patents granted this to William Box and his Heirs, by vertue whereof he was ſeiſed: Francis Searles entred upon him and was ſeiſed, and enfeoffed Pigot, 20 Jac. by virtue whereof he was ſeiſed, &c. and the three other juſtifie as Servants to Pigot, that they the ſaid day and year filled up the ſaid Water-courſe, as it was lawful for them to do: and that this is the ſame Treſpaſs, &c. The Plaintiff demurs. And the Queſtion is, whether the Unity of Poſſeſſion of all in H. 8. hath extinguiſhed the Water-courſe.

Whether Unity of Poſſeſſion in ſeveral Lands, ſhall deſtroy a Water-courſe.

And by Dorrell for the Plaintiff, if it were of a Common, it is clear, that it is deſtroyed, becauſe Common ought to be in another Man's Land, but not in our Caſe, for if one preſcribe to have Warren, if he purchaſe the Land yet he ſhall have Warren, 11 H. 7. 25. there are two Houſes, and the one preſcribe that the other ſhall mend the Gutter, and afterwards they come to the hands of one Man, and then he alien one of them, this Unity ſhall deſtroy the mending of the Gutter.

Berd for the Defendant, that the Unity hath deſtroyed the Cuſtom, 21 E. 3. 2. A way is but an Eaſment, yet by the purchaſe of the Land the way is extinguiſhed, and alſo the Watering-courſe is not only an Eaſement, but a Profit, or Prender; and he cited Dyer 295. in caſe of an Incloſure, that the Incloſure is extinguiſhed, but there is made a quære, and he cited 38 Eliz. in C. B. an Opinion, that by purchaſe of a Cloſe the Incloſure is extinguiſhed; a fortiori here becauſe it is a Profit: And for the Caſe of 11 H. 7. it is by the Cuſtom of London, but there is no Cuſtom in our Caſe, and the Caſe of a Warren is not like to our Caſe, becauſe a Man may have Warren in his own Soil; And in Michaelmas Term next the Caſe was argued again by Barkeſdale for the Plaintiff, that the unity of Poſſeſſion in H. 8. had not extinguiſhed the Water-courſe, and that the Terminus ad quem, and the Medium alſo being in one, had not extinguiſhed nor deſtroyed it. And 1 Co. lib. 4. 26. Benedicta eſt expoſitio quando res redimitur a deſtructione; The Law will not deſtroy things, but the Law will ſometimes ſuffer a Fiction (which is nothing in rerum natura) ut res magis valeat. I confeſs that Profit apprender as Common, or Rent is extinguiſhed by Unity of Poſſeſſion for Common it appeareth in 4 E. 3. and Co. lib. 4. Terringham's Caſe: And for Rent it appeareth in 4 H. 4. 7. and in 21 E. 3. 2. it appeareth that a way is extinguiſhed by unity of Poſſeſſion, 3 H. 6. 31. Brook Nuſance 11. for it is repugnant for a Man to have a way upon his own Land: But I conceive that our Caſe differs from the

the Caſe of a Way, and that for this reaſon; where the thing hath a Being and Exiſtence, notwithſtanding the Unity there it is not deſtroyed by the Unity, but the Water-courſe hath a Being notwithſtanding the Unity, ergo, &c. I will prove the major Propoſition by theſe Caſes, 35 H. 6. 55, 56. Where a Warren is not extinct by the Feoffment of the Land, for I may hawk and hunt in my own Land as in another Man's, ſo the Warren hath Exiſtence, notwithſtanding the Unity, Dyer 326. Where the Queen was ſeiſed of Whaddon Chaſe, and the Lord Gray was Lieutenant there in Fee, and he and his Anceſtors and their Keepers had by Preſcription uſed to hunt wandring Deer in the Demeſns of the Manor of S. adjoyning as in Purlieus: the Manor of S. comes into the Queens hands, who grants this to Forteſcue in Fee, with free Warren within the Demeſns, &c. it was holden that the Unity doth not extinguiſh the Purlieu, Dyer 295. Two Cloſes adjoyn, the one by Preſcription is bound to a Fence, the Owner of one purchaſe the other, and ſuffer the Hedges to decay, and dies, leaving two Daughters his Heirs, who make Partition: Quere whether the Preſcription for the Incloſure be revived; true it is that it is made a Quere, but he ſaith, ſee the like Caſe, 11 H. 7. 27. of a Water which proves our Caſe, as I will ſhew afterwards.

For the ſecond Propoſition that the Watering hath Being, notwithſtanding the ſaid Unity, I will prove it by 12 H. 7. 4. A Præcipe quod reddat of Land Aqua Co-operta. Mich. 6 Jac. Challenor and Moore's Caſe. An Ejectione firmæ, was brought of a Watering-courſe, and there reſolved that it does not lie of it, becauſe it is not firma, ſed currit, but of Terra aqua co-operta, it doth lie. Alſo I will take ſome Exceptions to the Bar, there is no Title in the Bar for the Defendant Pigot, and ſo we being in Poſſeſſion, albeit in truth we have no Title, yet he who hath no Title cannot ouſt us, neither can ſtop the ſaid Water-courſe, and it is only ſhewn in the Bar that Searles entred and enfeoffed Pigot, but for any thing as yet appears the true Owner continued in Poſſeſſion, 21 Jac. C. B. Cook againſt Cook in a Writ of Dower, the Defendant pleads an Entry after the Darrein Continuance, and doth not plead that he ouſted him, and upon this the Plaintiff demurs, and there adjudged that it is no Plea in Bar, becauſe he doth not ſay, that the Defendant entred and ouſted the Tenant. 2. Exception, the Action is brought againſt four, ſcil. Pigot, Cole, Branch and Elyman; and Pigot hath conveyed a Title from Searles, the three other Defendants juſtifie, but Pigot doth not ſay any thing but that Searles enfeoffed him, 7 H. 6. an Action of Waſte is brought againſt many, one anſwers, and the other not, this is a Diſcontinuance: And for the principal matter. I will conclude with 11 H. 7. 25. Broo. Extinguiſhment 60. Two have Tenements adjoyning, and the one hath a Gutter in the others Land, and afterwards one purchaſe both, and then he alien one to one, and another to another, the Gutter is revived notwithſtanding the Unity, becauſe it is very neceſſary, and ſo he prayed Judgment for the Plaintiff. Bear for the Defendant: I in a manner agree all the Caſes which have been put on the other ſide; and I conceive that the Water-courſe is not Stagnum but Servitium, which is due from the one Land to the other: It is but a Liberty, and therefore I agree Challenor's Caſe, which is but a Liberty that an Ejectione firmæ doth not lie of it, but Ejectione firmæ lies De ſtagno.

For the firſt Exception I anſwer and confeſs, that to alledge an Entry after the Darrain Continuance, without alledging an Ouſter of the Tenant, cannot abate the Writ, for the Defendant may enter to another intent as appeareth in the Commentaries, and with the Aſſent of the Tenant; But here it was alledged that a Feoffment was made and a Livery which implies another.

For the matter in Law, I conceive that the Water-courſe is extinguiſhed, and it may be compared to 21 E. 3. 2. The Caſe of a way which is extinguiſhed by Unity of Poſſeſſion, Hill. 36 Eliz. Rot. 1332. Hemdon and Crouch's

Caſe

Case. Two were seised of two several Acres of Land, of which the one ought to inclose against the other, one purchase them both, and lets them to several Men, and there the Opinion was, and adjudged accordingly, that the Inclosure is not revived, but remains extinguished, 39 Eliz. Harrington's Case, the same thing resolved, and albeit in Dyer 295. is a quære, yet the better Opinion hath been taken according to these Resolutions. Hill. 4 Jac. Jordan and Ayliffe's Case, when one had a Way from one Acre to another, and afterwards he purchased the Acre upon which he had the Way, and afterwards sold it, and in that Case the Opinion of three Justices was that the Way was extinguished; also 11 H. 4. 50. and 11 H. 7. 25. prove this Case, for the said Case is compared to the custom of Gavel-kind and Burrough English, and there the quære is made whether by the custom it be revived, and if it be a Custom which runs with the Land, the Unity of Possession doth not extinguish it, Co. lib. 4. Terringham's Case, and 24 E. 3. 2. Common Appendent is destroyed by Unity of Possession, and yet it is a thing of common Right, but a Water-course being a thing against common Right, a Fortiori it shall be extinguished. Now I will take some Exceptions to the Declaration.

1. Because he hath laid a Prescription for a Water-course, as to say, that it was belonging to a Rectory, to which, &c. and this is a good Exception, as appears by 6 E. 6. Dyer 70. Thom's Case, where Exception was taken, that before his Prescription he doth not say, that it was Anciquum parcum, which Exception (as it is there said) was the principal cause that Judgment was given against him, and also as the Case is here, it ought to be a Rectory impropriate, and this cannot be before the time of H. 8. which is within time of memory, for before the said time no Lay-person could have a Rectory impropriate, and therefore I pray Judgment for the Defendant.

Barkstedale said, that the Prescription is well laid, and that he would prove by 39 H. 8. 32. and 33 H. 6. 6. and per curiam the Prescription is good enough, and albeit it is not said, that it is Antiqua Rectoria, yet it is well enough, Mich. 1 Car. at Reading Term in Brock and Harris's Case, he doth not say, that it is Antiquum Messuagium, and yet resolved good.

Doderidge, the Case of 6 E. 6. differs in this point from this Case, for a Rectory shall always be intended ancient, and so is not a Park, for this may be newly created: and he put this Case, suppose I have a Mill, and I have a Water-course to this in my own Land, and I sell the Land, I cannot stop the Water-course.

Crew Chief Justice seemed of Opinion that the Prescription was gone, and that the better Opinion in Dyer, 13 Eliz. hath always been that the Inclosure is gone by Unity of Possession, but yet the Water-course is matter of necessity.

Doderidge and Whitlock, the Way is matter of Election, but the Course of Water is natural.

Jones Justice, There is great difference between a Way and a Water-course as to this purpose, for admit that this Water-course, after that it had been in the Curtilage of the Plaintiff, goes further to the Curtilage of another, shall not that other have the benefit of this Water-course notwithstanding the Unity of Possession? I think clearly that he shall.

Doderidge, My Opinion is, that the Water-course is not extinguished by the Unity of Possession: but some conceived that he had declared his Opinion in terror to the Defendant: And afterwards the same Term Barkstedale for the Plaintiff said, that he had agreed the Case before, and therefore would now only endeavour to answer some Exceptions which had been taken to the Declaration.

1. Exception hath been that no Prescription or Custom is made for this Water-course, but only that Currere solebat & consuevit. But I conceive that the Declaration is good notwithstanding this, because the Plaintiff here doth

not

not claim an intereſt in the Water-courſe, but in the Land in which, &c. and therefore it is good, and this appeareth by 12 E.4.9. the Prior of Lantonies Caſe in a preſcription in a Market overt generally, and the reaſon there was, becauſe he was a ſtranger, as in our caſe he is, and this pleading appeareth alſo to be good by Cooks Book of Entries, 18. Smiths Caſe, which was entred 9 Jac. Rot. 366. in this Court. 2. Exception was, becauſe it is not ſaid, that it was Antiqua Rectoria. 3. Exception, becauſe it doth not appear that he was a ſpiritual man to whom the Demiſe of the Rectory was made. 4. Becauſe it is not ſaid, that the Water-courſe Ad prædict. Rectoriam pertinet. 5. Becauſe the Water-courſe is alledged to be for his cuſtomary Tenants of the ſaid Rectory, and this is not good, as appeareth by 21 Eliz. Dyer, 363. Preſcription, Pro quolibet cuſtomar. Tenente, is not good: but I conceive that this caſe is not our caſe, for here is Cuſtomarius tenens Rectoriæ, and there it is agreed that Quilibet cuſtomarius tenens Maner. had been good: And the plea in Bar hath ſalved theſe objections, and therefore he prayed judgment for the Plaintiff.

Jeremy for the Defendant: And firſt for the matter in Law, it ſeemed to him that by the unity of poſſeſſion the Water-courſe is extinguiſhed, and the Water-courſe may well be compared to the caſe of the way, for as a way is a paſſage for men over the land, ſo water hath paſſage upon the land, and a way is extinguiſhed by unity, as appeareth by 21 E.3.2. 11 H.4.5. 21 Aſſ. and Davies Reports 5. and in 4 Jac. Jordan and , Caſe it was the better opinion that a way was extinguiſhed by unity of poſſeſſion; true it is, that there Popham chief Juſtice put the difference, where the way is of neceſſity and where not, for where the way is of neceſſity there it ſhall not be extinguiſhed: This caſe hath been compared to the caſe of a Warren in 35 H 6. but I conceive that the caſes are not alike, becauſe a Warren is a mær liberty, 8 H. 7.5. A man may have a Warren in his own Land, and Co.lib.7. Buts Caſe by a Feoffment of Land, a Warren doth not paſs, but this Water-courſe hath its original out of the Land, and this caſe cannot be compared to an ancient Water-courſe running to a Mill, for notwithſtanding the unity it ſhall paſs with the Mill, for otherwiſe it ſhall not be Molendinum aquatinum, ſo that the water there is parcel of the thing, and ſo of neceſſity ought to paſs with the thing, but here it doth not appear that it is a Water-courſe of neceſſity, and for any thing that appeareth, it may be filled with another Water-courſe: Alſo I conceive that the Declaration is not good. 1. Becauſe neither preſcription nor cuſtom is laid for the Water-courſe, and it appeareth in Co. Book of Entries, Holcome and Evans caſe, and the old Book of Entries, 616, 617. Mich. 1. Car. Rot. 107. Turner and Dennies caſe in this Court, in treſpas for breaking his Cloſe, &c. the Defendant juſtified for a way, &c. and that he was poſſeſſed for years, and for him and his Occupiers had a way over the Land, the Plaintiff demurred, and reſolved that the preſcription is not good. 2. The Declaration is inſufficient being an action upon the caſe for the ſtopping of a Water-courſe, and it is not Vi & armis, nor Contra pacem, Co. lib. 9. 50. the Earl of Shrewsburies caſe, when there are two cauſes of an action upon the caſe; the one Cauſa cauſans, the other Cauſa cauſata, Cauſa cauſans may be alledged Vi & armis, for this is not the immediate cauſe of the action, but Cauſa cauſata F. N. B. 86. H. and 92 E. in the end of the Writ of action upon the caſe ſhall be Contra pacem. 3. Alſo he hath preſcribed for the Tenants of the Rectory, which is not poſſible, for no Lay-man could be Tenant of a Rectory, or of Tithes before the Statute of H. 8. and therefore I pray Judgment for the Defendant.

Whitlock chief Juſtice conceived that the Declaration was good, and the bar is naught, both for the form and matter: the queſtion here is of Aqua profluens, and I conceive that there needs no preſcription or cuſtom in this caſe, for water hath its natural courſe, and as is obſerved by Brudnel in 12 H. 8.

Natura ſua deſcendit, it may be called Uſu captio, or Uſage, and he conceived that the Action upon the Caſe very well lies in this Caſe, like to the Caſe where a Man hath an Houſe and Windows in it, and another erect a new Houſe and ſtop the Light, then I may have an Action upon the Caſe; but true it is, that I ſhall not only count for the loſs of the Air, but alſo I ought to preſcribe that time out of mind Light hath entred by theſe Windows, &c. 18 E. 3. If there be a School-maſter in a Town, and another erect a new School in the ſame Town, an Action upon the Caſe doth not lie againſt him, becauſe Schools are for the publick benefit, and every private Man may have a School in his Houſe. And for the Exception, that a Lay-man cannot be poſſeſſed of a Rectory, I conceive that the Declaration is good notwithſtanding, for a Lay-man may have a Rectory by Demiſe.

And for the Plea in Bar, it is not good for the Form, becauſe that Searles entred and enfeoffed Pigot, and it is not ſaid, that he entred, and Expulit, and if a Man enter and make a Feoffment, the Owner being upon the Land the Feoffment is void, and therefore an actual Ouſter ought to be ſhewn: And for the matter in Law, he conceived that the Bar was not good, for by the Unity of Poſſeſſion the Water-courſe is not extinguiſhed, and yet I agree the Caſes of a Way and Common upon the differences of Rights which are put in Bracton, lib. 4. 221. Theſe are called Servitutes, as jus eundi, fodendi, hauriendi, &c. ſunt ſervitutes quas prædia ex quibus exeunt aliis prædiis debent, and are called Servitutes prædiales, and this began by private Right, to wit, by Grant or Preſcription.

A Way or Common ſhall be extinguiſhed, becauſe they are part of the Profits of the Land, and the ſame Law is of Fiſhings alſo, but in our Caſe the Water-courſe doth not begin by the conſent of Parties, nor by Preſcription, but Ex jure naturæ, and therefore ſhall not be extinguiſhed by Unity: A Warren is not extinguiſhed by Unity, becauſe a Man may have a Warren in his own Land, and in the Caſe of 11 H. 7. the Gutter was not extinguiſhed only by the Unity of Poſſeſſion, but there alſo appeareth in the Caſe that the Pipes were deſtroyed, whereby it could not be revived, and although the Book of 13 Eliz. Dyer 295. Two Cloſes adjoyn together, the one being by Preſcription bound to a Fence, the Owner of the one purchaſe, the other dies, having iſſue two Daughters, who make Partition, it is a quere whether the Incloſure be revived, yet I conceive clearly, that by Unity of the Poſſeſſion the Incloſure is deſtroyed, for Fencing is not natural, but comes by Induſtry of Men, and therefore by the Unity it ſhall be gone, and ſo briefly with this diverſity he concluded that where the thing hath its Being by Preſcription, Unity will extinguiſh it; but where the thing hath its Being Ex jure naturæ, it ſhall not be extinguiſhed, and therefore the Plaintiff ought to have Judgment.

Jones Juſtice agreed, that the Declaration is good, and that the Bar alſo is good in manner, but for the matter in Law it is not good.

As to the firſt Exception to the Declaration, I conceive it is good, albeit there wants a Preſcription, and this is the ordinary way of pleading as appears in Co. lib. 4. Luttrel's Caſe, and in all the Preſidents before cited.

2. For the Exception Vi & armis, he conceived this difference, where the Act is a Treſpaſs and a Nuſance, there it may be laid to be Vi & armis, but if it be a Nuſance only and not a Treſpaſs, it is otherwiſe, as if I have a way over another Man's Land, if a Stranger dig in the Land ſo as I cannot have the way, now becauſe it is a Treſpaſs to the Owner of the Soil, in my Action upon the Caſe againſt a Stranger, I may have Vi & armis, but if the Owner ſtop the Way, there Vi & armis ſhall not be in my Action upon the Caſe.

For the third Exception, becauſe he doth not ſay, Ad Rectoriam ſpectantem. but I conceive that it ſhall be intended ad Rectoriam impropriat. and ſo it appeareth.

4. Where

4. Where it is ſaid, Watering-courſe for his Tenants, I conceive it is good enough, being in an Action upon the Caſe where Damages only are to be recovered: That the Bar alſo is good in form, for although the Tenant here be a Diſſeiſor, yet it is a good Bar, for it matters not whether he hath a Title or no, if the Water-courſe be extinct by the Unity: for the matter in Law, he conceived that the Unity of Poſſeſſion had not extinguiſhed the Water-courſe. A Man hath things out of another Man's Land, either by Grant as a Seigniory, Rent, Common, &c. and theſe are extinguiſhed by Unity, &c. and the reaſon is, becauſe one who hath Intereſt as Owner of the Land, cannot have a particular Intereſt in the ſame Land alſo. Or by Preſcription, and thoſe things are extinguiſhed by Unity of Poſſeſſion alſo, and not only for the firſt reaſon becauſe he is Owner of the Land, and ſo cannot have a particular Intereſt in the ſame Land alſo, but alſo becauſe that by the Unity the Preſcription fail. And for the Caſe in Dyer, 13 Eliz. I conceive that by the Unity the Incloſure is gone, and ſo it was reſolved in 37 Eliz. for every one is not bound to incloſe: For the Caſe of the Way, I will ſuſpend my Opinion concerning it, becauſe Clark and Lamb's Caſe is now depending touching it in the ſame Point.

But now for our Caſe, it differs from the other Caſes, for the Preſcription here is in another manner than is made for Common, for it ſhall be pleaded either as appendant, or appurtenant, but Currere ſolebat is only in this pleading, for here no Intereſt is claimed, but in the other Caſes an Intereſt is claimed: In this Caſe the Land remains as it was before, and therefore the Unity will not extinguiſh it: and if ſuch an Unity by Conſtruction of Law ſhould extinguiſh Water-courſes, it would be too dangerous: for ſuppoſe that a Man hath a Water-courſe from Thames to his Houſe in Lambeth, if he purchaſe a parcel of Land in Hendley; now becauſe that the Thames come by the ſame Land, his Water-courſe ſhall be extinguiſhed. Alſo ſuppoſe that the Water-courſe after it hath been in the Curtilage of the Plaintiff, goes into another Curtilage, is it reaſon that by this Unity the ſecond Man ſhall loſe his Water-courſe? without doubt it is unreaſonable. And the Caſe of 11 H. 7. of the Cuſtet, warrants this Opinion, and therefore the Plaintiff ought to have Judgment.

Doderidge Juſtice, I conceive no great difficulty in the Caſe; for the Exceptions to the Declarations they are not material.

1. That there wants Preſcription or Cuſtom, I conceive that it is good enough, for here are the words of Currere ſolebat & conſuevit, and Conſuevit is a good word for a Cuſtom.

2. That a Lay-man cannot have a Parſonage; true it is, that a Lay-man cannot be a Parſon, but he may have a Parſonage, for he may be Leſſee of it, which appeareth many times in our Books.

3. That it is not alledged to be Vi & armis, this is the moſt colourable Exception, and the Caſe and Rule cited out of Co. lib. 9. the Earl of Shrewſbury's Caſe is good Law, but it is impoſſible to plead Vi & armis in this Caſe, for the Unity was in H. 8. and the Wrong is ſuppoſed after the Severance, and it is ſuppoſed to be done by the Owner of the Land, and a Man cannot do a thing upon his own Land Vi & armis.

4. Becauſe it is not alledged to be an ancient Rectory: I conceive it need not, becauſe the Law preſumes all Rectories to be ancient, the Patronages whereof are gained Ratione fundi, fundationis, vel dotationis.

5. Becauſe he doth not ſay, that Pertinet ad Rectoriam: But he hath ſaid a thing which amounts to as much; for it is ſaid, that in the Rectory was a certain Curtilage in which there is a Watering-pond, and the Curtilage is part of the Houſe, and therefore he need not ſay, that it belongs to the Houſe. For the War I conceive that it is good for the Manor: A Man makes a Feoſment of Land, the Owner of the Land being preſent at the ſame time, no-

thing wrongs by the Livery, for the reaſon before given by Jones. For the matter of Law he conceived that the Unity of Poſſeſſion doth not extinguiſh the Water-courſe, and that for two reaſons.

1. For the neceſſity of the thing.

2. From the nature of the thing being a Water-courſe, which is a thing running.

1. For the neceſſity, and this is the reaſon that Common Appendant by the Unity of Poſſeſſion ſhall not be extinguiſhed, for it is appendant to ancient Land-hide, and Gain Arable Land, which is neceſſary for the preſervation of the Commonwealth; and as in this Caſe there is a neceſſity of Bread, ſo in our Caſe there is a neceſſity of Water: And for the Caſe of a Way Diſtinguendum eſt, for if it be a Way which is only for Eaſment it is extinguiſhed by Unity of Poſſeſſion, but if it be a Way of Neceſſity, as a Way to Market or Church, there it is not extinguiſhed by Unity of Poſſeſſion, and accordingly was the Opinion of Popham Chief Juſtice, which I take for good Law, and the Caſe of 22 H. 7. 29. is a notable Caſe, and there a Reaſon is given why a Gutter is not extinguiſhed by Unity of Poſſeſſion, becauſe it is matter of neceſſity.

2. From the nature of Water, which naturally deſcends, it is always current, Et aut invenit aut facit viam, and ſhall ſuch a thing be extinguiſhed which hath its Being from the Creation. Co. lib. 4. Luttrel's Caſe, a Mill is a neceſſary thing, and if I purchaſe the Land upon which the Stream goes which runs to this Mill, and afterwards I alien the Mill, the Water-courſe remains. So if a Man hath a Dye-houſe, and there is a Water running to it, and afterwards he purchaſe the Land upon which the Water is current and ſell it, yet he ſhall have the Water-courſe. Dyer: Dame Browns Caſe, and the principal Caſe in Luttrel's Caſe, a Fulling-mill made a Water-mill, this ſhall not alter the nature of the Mill, but yet it remains a Mill, ſo the Water hath its courſe notwithſtanding the Unity, and he concluded for the Plaintiff.

Crew Chief Juſtice, I agree that the Declaration is good, and alſo that the Bar is good for the manner, but for the matter in Law, I conceive that it is not good. In our Law every Caſe hath its Stand or Fall from a particular Reaſon or Circumſtance: for as Warren and Typhes they are not extinguiſhed by Unity, becauſe they are things collateral to the Land: And for the Caſe of 13 Eliz. in Dyer, of an Incloſure; I conceive that by the Unity the Incloſure is deſtroyed, for the Preſcription was interrupted, and in Day and Drake's Caſe, 3 Jac. in this Court it was adjudged that in the ſame Caſe the Preſcription was gone; It may be reſembled to the Caſe of Homage Anceſtrell, 57 E. 3. Fitzherbert Nuſans: And for our Caſe it is not like to the Caſes of Common, or a Way, becauſe the Water-courſe is a thing natural and therefore by Unity it ſhall not be diſcharged; alſo there is a Linement out of which every Man ſhall have a benefit, and therefore he concluded that Judgment ſhould be given for the Plaintiff; And Judgment was commanded to be entred for the Plaintiff.

The ſame Term in the ſame Court.

Welden *verſus* Veſey.

AN Action of Debt was brought by Welden Sheriff of the City of Coventry againſt Veſey, upon the Statute of 29 Eliz. cap. 4. and declares, that it is provided by this Statute that no Sheriff or Miniſter, &c. ſhall take for an Execution, if the ſum doth not exceed 100 l. but 12 d. for every 20 s. and being above the ſum of 100 l. 6 d. for every 20 s. and ſhews that whereas the ſaid Veſey had Judgment againſt one in an Action of Debt, that the Plaintiff by virtue of a Capias directed to him, took the Body of the ſaid Perſon condemned, and that it was delivered to the Plaintiff, and that he for levying of the Money had brought this Action.

The Defendant by way of Bar ſaith, that it is provided by this Act that it ſhall not extend to Executions in Towns Corporate, and that this was within Coventry, and ſo demurred upon the Declaration.

And Whitwick argued for the Plaintiff; two things are conſiderable in this Caſe.

1. Whether where the ſum exceeds 100 l. the Sheriff ſhall have 12 d. for every 20 s. of the 100 l. and 6 d. for that which is over, or 6 d. only for every 20 s. for all the ſum.

Whether a Sheriff, or, *&c.* ſhall have 12 *d.* in the pound for the firſt 100 *l.* and 6 *d.* for the reſt upon an Execution.

2. Whether this Statute extend to Judgments in Towns Corporate. For the firſt, the Letter of the Statute is clear that he ſhall have 12 d. for the firſt 100 l. and 6 d. for the reſidue, for the Statute is, that if it be above 100 l. that he ſhall have but 6. d. therefore if it be under 100 l. he ſhall have 12 d. for every 20 s. And the meaning of the Statute is plain alſo, for otherwiſe the Sheriff ſhall have a leſſer Fee where it is above 100 l. (as where it is 199 l.) than he ſhall have for 100 l. but this was not the intent of the Statute, but the greater the Execution, the greater the Fee: It was adjudged in one Gore's Caſe, 10 Jac. that an Action of Debt lies upon this Law, Paſch. 14 Jac. Rot. 351. Brole and Tumblerſon Sheriffs of the City of London, brought Debt againſt Nathanael Michell for Execution of 400 l. for 12 l. 10 s. ſcil. 5 l. for the firſt 100 l. and 6 d. for every 20 s. after: But I confeſs that the principal Queſtion there was, whether an Action of Debt lies for the Money, and it was reſolved that it did, and Judgment was given for the Plaintiff.

2. To the Proviſo, that this doth not extend to Fees in a Town Corporate, whether this extend to Executions which go out of Judgments in this Court, or in the Common Pleas into Towns Corporate. The Statute ſhews that before that time the Sheriff had taken great Fees, which the Parliament conſidering, reſtrained them to a Certainty: The words of the Proviſo are general: Provided that this Act ſhall not extend to any Fees to be taken for any Execution within any City or Town Corporate, and although the words be general, yet the Expoſition ſhall be according to reaſon, as it is ſaid in Fulmerſton and Steward's Caſe in Plow. Expoſition, ſhall be made againſt the words, if the words be againſt reaſon. 5 H. 7. 7. 38 H. 3. Broo. Livery 6. The King ſhall have primer Seiſin of all Lands of his Tenant which he holds of him in Capite, but if one holds of the King in Capite, in Socage, he ſhall pay no primer Seiſin to the King, and this Statute ſhall have this intendment, that this Proviſo ſhall extend only to Executions upon Judgments given in Cities and Towns Corporate, and not where Judgment is given in this Court, or the Common Pleas, and Executions are only there, and this ſeems to be a reaſonable Conſtruction; Executions in Towns Corporate, to wit,

Executions

Executions upon Judgments given in Towns Corporate. If the Sheriff make Execution at the Town ſide he ſhall have for his Fées as the Statute limits, and therefore he ſhall have it if within the Town, and if this ſhould not be ſo, this miſchief would enſue, that preſently when an Execution iſſues out againſt a Man, he will ſhelter himſelf in a Town Corporate, as in a Sanctuary, and the Sheriff will not do Execution there, becauſe he ſhall not have ſo great a Fée for doing it as if it were in another place, and ſo Execution (which is the life of the Law) ſhall be undone.

Jenny for the Defendant; and firſt, if the ſum exceed 100 l. he ſhall have but 6 d. for every 20 s. of all. It is conſiderable that at Common Law the Sheriff ought to do Execution freely without any Recompence. In Booth and Sadler's Caſe lately in this place, an Action upon the Caſe was brought by a Bayliff, that whereas a Warrant for taking ſuch a Man was directed to him, the Defendant promiſed him 40 s. for his pains, he took the Man and brought an Action for the 40 s. and it was agreed that he ſhould not have it. The Law abhors that great Fées ſhall be given for Executions, Co. lib. 3. 7. in Heydon's Caſe: In the Expoſition of the Statute three things are conſiderable.

1. What the Common Law was before the making of it.
2. What the miſchief was at the Common Law.
3. The Remedy which the Statute gives.
4. The true Reaſon of the Remedy. The Common Law was, that the Sheriff ſhall not take any Fée for Execution, Ergo now he ſhall take as ſmall a Fée as may be, becauſe this is nigheſt to the Common Law: And the firſt words are declarative what Fées he ſhall take; and the ſubſequent words affirmative what Fées they may now take, to wit, where the ſum doth not exceed 100 l. 12 d. for every 20 s. 14 Jac. It was objected, that the Sheriff is not bound to do Execution before he hath his Fée, and then it was reſolved that he might have an Action of Debt, and ſo it ſeems that the Party is not bound to give levying Money before that the Execution be done, and otherwiſe, the Party Plaintiff may be at great miſchief if the other be not taken: And it hath been agreed lately in the Common Pleas, that if the ſum exceed 100 l. he ſhall have but 6 d. for every 20 s. And as to the ſecond Point, he endeavoured to maintain that the Proviſo extends to Executions in Towns Corporate, although the Judgments upon which the Executions iſſue are given in other Courts, and this is the conſtant practiſe of the City of London.

The Judges delivered their Opinion, with a Proteſtation, that they might recall them, if afterwards better reaſon appeared.

Crew Chief Juſtice was of Opinion that he ſhall have but 6 d. for every 20 s. if the ſum exceed 100 l. and the ſum ſhall not be divided, but if the ſum be under 100 l. then 12 d. for every 20 s. and this is the reaſon of the Law.

And for the ſecond Point, although the Judgment be given in the ſuperior Court, yet if the Sheriff does Execution there, he ſhall have his levying Money, and this is within the intention of the Proviſo.

Doderidge Juſtice, the firſt Queſtion is upon the Expoſition of the Statute, the ſecond upon the Proviſo: For the firſt two Expoſitions may be made as hath been remembred, then we will enquire of the Interpretation: This Statute was made for the benefit of Sheriffs, that as they are in hazard by taking of Men, becauſe many times reſiſtance was made. 2. When the Sheriff had taken a Man, and in the carriage of him to Priſon he had eſcaped, an Action upon the Caſe did lie againſt the Sheriff, and when he had him in Priſon, he ought to have great care in keeping of him, for an Action lies againſt him if he eſcape: and therefore although on the one ſide there was a great miſchief by reaſon of great Fees that the Sheriff took for Execution; ſo on the other ſide, the Law tendred Sheriffs in reſpect of the hazard and care which they had of Men in Execution, and therefore the Law in an indifferency provides that the Sheriff ſhall have a good Fee for Execution, and alſo it provides

againſt

againſt his Extortion, and ſo it is indifferent between the Oppreſſion of the Sheriff and Covetouſneſs, and we are not to judge according to the intent, but according to the equity of the Law, for Equality to prevent the Covetouſneſs of Sheriffs and the Oppreſſion of the People; then in this Caſe, if he ſhall have but 6 d. for every 20 s. for 200 l. he ſhall have no more for Execution of 200 l. than if it were 100 l. But I think this was not the intent of the Act.

For the ſecond Point, I take it that this Statute did not extend to Suits within Towns Corporate, and Executions upon them, for they are not at any great trouble for doing of Execution within their Towns, nor hazard: But if a Sheriff does Execution in a Town Corporate, then he ſhall have according to the Statute, for it may be that the Priſon is far diſtant, And I upon the ſuddain conceive that this Proviſo extends only to Towns Corporate, which are Counties.

Jones Juſtice, Three Queſtions have been made upon this Statute.

1. For the nature of the Action which the Sheriff is to have upon this Statute, and for that it hath been many times reſolved that he ſhall have an Action of Debt, for when a Remedy is given by a Statute, and no Action is given by the ſame Statute whereby the Penalty ſhall be recovered, there he ſhall have an Action of Debt.

2. Who ſhall have the Fee when the Sheriff makes a Warrant to a Bayliff of a Liberty, the Bayliff of the Liberty or the Sheriff?

The ſecond Branch of the ſecond Queſtion is, that when one Sheriff makes the Extent, and another Sheriff makes the Liberate, who ſhall have the Fee?

3. The third Queſtion hath been in debate in the Common Pleas, and there was ſome of Opinion that if the ſum be above 100 l. and under 200 l. that the Sheriff ſhall have 12 d. for every 20 s. of the firſt 100 l. for otherwiſe the Sheriff ſhall have a leſs for for Execution of 199 l. than he ſhall have for 100 l. But if it be above 200 l. he ſhall have 6 d. ab initio.

My Opinion on the ſudden is, that for every 20 s. of the firſt 100 l. he ſhall have 12 d. and for the reſidue he ſhall have 6 d. for every 20 s. and the other ſhall not be altered.

And for the ſecond Point, I hold that this Proviſo extends only to Judgments originally commenced in Towns Corporate, and not to Executions upon Judgments given in ſuperior Courts, for then the Sheriff does Execution as an Officer to theſe Courts: And the Sheriff of the County is at as great pains, as if he were Sheriff of another County, and ſhall not be bound by the Proviſo.

Whitlock Juſtice was for the Plaintiff in both the Points, to wit, that the Sheriff ſhall have 1 s. for every 20 s. of the firſt 100 l. and 6 d. for every 20 s. of the reſidue. And by him the Sheriff may refuſe to do Execution until the levying money be paid to him.

And for the ſecond Point, the Sheriff of the County of the City is not within the Proviſo, but ſhall have the Fees by the Statute provided, as well as the Sheriff of the County ſhall have, for the words are general, and the Exception goes to all Towns Corporate and Cities, but doth not ſay Cities which are Counties, and therefore this Sheriff is within the benefit of this Law: And in Michaelmas Term next following the Caſe was moved again by Whitlock for the Plaintiff, and he ſaid that he would not ſpeak to the ſecond Point, becauſe the Court had delivered their Opinion, that the Proviſo in the Statute, that this ſhall not extend to Executions in Towns Corporate, it is to be intended of Executions in Towns Corporate upon Judgments there given: But for Executions there upon Judgments given in this Court, or any other ſuperior Court, the Sheriff ſhall have ſuch Fees as are limited by this Statute. And the Court ſaid to him that they were agreed of it.

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And as for the firſt point, he conceived that the Sheriff ſhall have 12. d. for levying of every 20. s. of the firſt 100 l. and 6 d. of every pound more, and this appears clearly by the Letter of the Statute: And the Caſe in Mich. 19 Jac. in C. B. between Emſon and Bathirſt doth not make againſt it, for the reſolution of the ſaid caſe was upon other matters: The caſe being a man was bound in a Statute of 120 l. the Sheriff extends, and before the Liberate takes double Bond of the party for payment of his Fees, and afterwards brought Debt againſt the party, who pleads the ſaid matter in Bar, and the Statute of 23 H. 6. cap. 10. And in the caſe were three points.

1. Whether the Sheriff may take a double Bond for the payment of his Fees, and it was reſolved that the Bond was void, for the Sheriff might have Debt upon the Statute for his Fees.

2. Whether the Sheriff ſhall have his Fees before the Liberate, and reſolved that he ſhall not.

3. Was this very queſtion, and two Juſtices were againſt one, that where the ſum exceeds 100 l. he ſhall have but 6 d. for levying of every 20 s. of the firſt 100 l. But the Judgment was given upon the other points. All the Court ſeemed to be of opinion that he ſhall have 12 d. for every 20 s. of the firſt 100 l. and 6 d. for every 20 s. of the reſidue.

The ſame Term in the ſame Court.

Awdley *verſus* Joy.

AWdley being put out of the Town-Clarkſhip of Bedford, moved for a Writ of Reſtitution to the place, and it ſeemed to Doderidge Juſtice, that the Juſtices of this Court have power to grant reſtitution in this caſe, and he cited a Caſe in 16 Eliz. in this Court, where reſtitution was granted in ſuch a Caſe, and 43 Eliz. by warrant of Fennor Juſtice, a Writ of Reſtitution was granted.

A Writ of Reſtitution to a Town-Clark being ouſted of his Office.

One who was Town-Clark of Boſton for life was made Alder-man and put out of his Clarkſhip, and was reſtored. This Court hath power not only in judicial things, but alſo in ſome things which are extrajudicial. The Maior and Comminalty of Coventry diſplaced one of the Alder-men, and he was reſtored; And this thing is peculiar to this Court, and is one of the flowers of it.

Crew chief Juſtice, doubted whether reſtitution could be made to Awdley, or no, becauſe the Office was granted to him in Reverſion, when it was expectant upon an Eſtate for life, and when the Officer for life dyed, Joy was elected, and he ſaid, that all the ſaid Writs remembred are, where he had once poſſeſſion.

Whitlock Juſtice, in the caſe of one Conſtable, 10 Eliz. It was reſolved that this Court hath power to grant Reſtitution in ſuch a Caſe, where he was put out of his Office: And by Jones Juſtice, this Court hath power to grant Reſtitution, and he remembred, one Mittlecots Caſe: And Noy being of Counſel with Awdley ſaid, that there are Preſidents to prove this in the times of E. 2. E. 3. and H. 6. And it was ſaid by the Juſtices that they are the chief Conſervators of the Peace within the Realm, and therefore have power for the preſervation of the Peace in ſuch factious Towns to grant reſtitution.

The ſame Term in the ſame Court.

Dabborne *verſus* Martin.

THomas Dabborne brought an Action upon the Caſe againſt Martin for theſe words, Thou art a Knave of Record, and a forgering Knave: And it was argued by Jermy for the Defendant, that the words were not Actionable, for a Knave ſignifies a Male-Child, ſo that it is no more than to ſay, Thou art a Male-Child of Record: And for forgering Knave the Action will not lie, for Forger is a general word, and may be applied to divers Trades, as forgering Smith, forgering Gold-ſmith; and when he called him forgering Knave, there was no Communication of his Office, 18 Jac. Sir William Brunskill brought an Action upon the Caſe, and declared that he was well deſcended, and was a Gentleman of the Chamber to Prince Henry, and he brought an Action for theſe words, Thou art a Coſener, and liveſt by Coſenage, and adjudged not Actionable, Coke, lib. 4. 16. Action upon the Caſe doth not lie for theſe words, Thou art a corrupt Man, if there were no Communication touching his Profeſſion; And it was argued for the Plaintiff that the words were Actionable, for it lieth for theſe words, Thou art an Out-putterer, if they were ſpoken in Northumberland where they are underſtood, but not here, becauſe they have no ſignification: And the words here are ſpecial and ſhall have reference to his Office, and ſhall have ſuch an Interpretation as is now uſed, and now Knave hath no ſignification of Male-Child.

Words. *Thou art a Knave of Record.*

Jones Juſtice ſaid, that if one ſaith, that ſuch an one is a corrupt Judge, Action lies, or if one ſaith of a Clark, that he is a forging Clark, Action lies: And in 28 Eliz. the Opinion of Juſtice Fennor was, that for theſe words (Thou haſt forged my Father's Will) Action lies.

Crew ſaid, that he did not underſtand the word (Forgering) but for calling one Knave of Record, Action lies. And Doderidge Juſtice ſaid, that he never gave way to theſe Actions upon the Caſe for words: And no Opinion was given this day.

The ſame Term in the ſame Court.

Goodwin *verſus* Willoughby.

GGoodwin brought an Action upon the Caſe againſt Joan Willoughby Wife of Thomas Willoughby, and upon non Aſſumpſit pleaded, it being found for the Plaintiff, it was moved in Arreſt of Judgment. 1. That the Plaintiff ſhews that Thomas Willoughby was indebted upon Account, and doth not ſhew that Joan Willoughby is Executrix or Adminiſtratrix, and yet that ſhe promiſed to pay, whereas in truth ſhe hath no cauſe to pay, for there is no Conſideration, and ſo Nudum pactum.

Jermy for the Plaintiff: for the firſt, becauſe it doth not appear for what cauſe he accounted; I anſwer, that this is but a mere Conveyance: And for the ſecond, that ſhe does not ſuppoſe that the Feme is Executrix, &c. But here is a good Conſideration, which is, that ſhe ſhall not ſue or moleſt, and that he gave day for Payment, this is a ſufficient Conſideration. But Stone of Council with the Defendant ſaid, that the firſt is the Ground of the Action, and therefore he ought to ſhew for what he accounted.

Crew Chief Juſtice, two Exceptions have been taken, 1. For the alledging the manner of the Account, which I conceive is good enough, and he need not ſhew the cauſe of the Account: And as to the ſecond, becauſe it doth not appear that ſhe is Executrix, or Adminiſtratrix, and ſo no Conſideration, and ſo no Aſſumpſit: But here ſhe aſſumes to be Debtor and makes a Promiſe to pay, which is an Acknowledgment of the Debt by inference, and therefore he conceived that the Aſſumpſit was good.

Doderidge Juſtice, for the firſt it is good enough, yet Cum indebitatus exiſtit is no good Aſſumpſit, but here he ſhews a ſpecial way of Debt, and it would be long and tedious to deſcribe his Account. For the ſecond there is no cauſe of Action, becauſe it doth not appear that ſhe is Executrix or Adminiſtratrix, or Executrix of her own Wrong.

Where Forbearance without cauſe of Action, is no Ground of an *Aſſumpſit*.

If I ſay to one do not trouble me, and I will give you ſo much, this is not Actionable, for there ought to be a lawful Ground, and for this cauſe the Declaration is void, for it is only to avoid Moleſtation: Give me time, &c. this is no good Aſſumpſit, for Forbearance is no Ground of Action where he hath no cauſe to have Debt.

Jones Juſtice agreed in the firſt with them, becauſe a general Action upon the Caſe ſufficeth, and in truth it is but an inducement to the Action; but for the other part he doubted, and he cited one Withypool's Caſe, an Infant within Age, promiſed to pay certain Money, he makes an Executor and dies within Age: the Executor ſaith to him to whom the promiſe was made, forbear and I will pay you, and there an Action upon the Caſe did lie againſt the Executor upon this promiſe, and yet it was a void Contract, but there was colour of Action, forbear till ſuch a time, now the other hath loſt the advantage of his Suit: But he gave no Opinion.

Crew, It is a violent preſumption that he is indebted: But by Doderidge here is no colour to charge her, but only by inference that ſhe is Executrix.

If a Stranger ſaith, forbear ſuch a Debt of J. S. and I will pay it, it is a good Conſideration for the loſs to the Plaintiff, and in this Caſe it appears not that there is any cauſe, and Broom Secondary ſaid, that Withypool's Caſe before cited was reverſed in the Exchequer-Chamber.

Jones, If an Infant makes a Promiſe, it is void, and he may plead non Aſſumpſit, which Doderidge did not deny: But upon his Obligation he cannot plead Non eſt factum, for he ſaid that he ſhall be bound by his hands, but not by his mouth.

The ſame Term in the ſame Court.

Drope *verſus* Theyar.

IN Debt by Drope againſt Theyar an Inn-keeper upon Iſſue joyned, and a Verdict for the Plaintiff, Bolſtred moved in Arreſt of Judgment for the Defendant, and the matter was, that one Rowly who was Servant to Drope, lodged in the White Hart at S. Giles, and there had certain Goods of his Maſters which were ſtolen from him in the night, and Drope the Maſter brought an Action thereupon, and it was moved by Bolſtred that the Plaintiff was without Remedy.

1. Becauſe it was in an Inn in London, for the Regiſter 105. Quando quis deprædatus euns per patriam, which (as he ſaid) could not be extended to an Inn in London.

2. It ought to be an Inn, as Inn-keeper.

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3. He ought to be as a Gueſt lodging, and this appeareth in Culey's Caſe, in 5 Jac. in Celly and Clark's Caſe (which was entred, Paſch. 4 Jac. Rot. 255.) It was adjudged that where the Gueſt give his Goods to his Hoſt to deliver to him three days after, and the Goods are loſt, that an Action is not maintainable againſt the Inn-keeper for them, and this was in an Inne in Uxbridge: And in one Sands Caſe, where the Gueſt came in the morning, and his Goods were taken before night, he ſhall have an Action againſt the Inne-keeper.

4. The Goods ought to be the Goods of the Party who lodgeth there, for the words are Ita quod hoſpitibus damna non eveniunt, and here the Maſter who brought the Action was not Gueſt: But admit the Maſter ſhall have the Action, yet he ought to alledge a Cuſtom that the Maſter ſhall have the Action for the Goods taken from his Servant, Trin. 17 Jac. Rot. 1535. Bidle, and the Maſter brought an Action for Goods taken from the Servant, and there it was reſolved that he ought to conclude that Pro defectu, &c. and apply the Cuſtom to him being Maſter: See Coke's Book of Entries, 345. And that a Cuſtom, that for other Mens Goods in the cuſtody of Gueſts, the Owner ſhall have an Action againſt the Inn-keeper if they be ſtolen.

Obj. This is the Common Law, and therefore ought not to be alledged.

Anſw. Where a Man takes upon him to ſhew a Cuſtom, he ought to ſhew it preciſely, he cited Heydon's Caſe, Coke, lib. 3. 28 H. 8. Dyer 38. And it was ſaid for the Plaintiff that Goods are in the poſſeſſion of the Maſter which are in the poſſeſſion of his Servant, and ſo here the Maſter might have had Action well enough, 8 E. 4. my Servant makes a Contract, or buys Goods to my uſe, I am liable, and it is my Act.

By the Court an Inne in London is an Inne, and if a Gueſt be robbed in ſuch an Inne, he ſhall have Remedy as if he were Euns per patriam: But the chief Point was, whether the Maſter ſhall have the Action in the Caſe where the Servant loſt the Goods, and by Jones Juſtice in 26 Eliz. in C. B. upon the Statute of Hue and Cry it was reſolved that if the Servant be robbed the Maſter may have the Action, and ſo by him ſhall it be in this Caſe. Doderidge Juſtice, the Servant may have the Action alſo: If the Servant be robbed of Wares, the Maſter or Servant may have an Appeal, 8 E. 2. Tit. Robbery; two joynt Merchants, one is robbed, both ſhall joyn in the Action, and may alſo joyn in the Appeal. But it may be objected (as Whitlock Juſtice did) that the Maſter is not Hoſpitans, I ſay this is to no purpoſe; A Man put his Horſe in the Stable, and before he goes to Bed or Lodging the Horſe is gone, he ſhall have an Action although he did not lodge there. For the word (tranſeuntes) although he be at the end of his Journey, yet it is within the Cuſtom, and he ſhall have Action. And by Crew, if I ſend Cloth to a Taylor, and it is ſtolen from him, the Taylor ſhall have an Action of Treſpaſs, or the Owner.

Jones, The Caſe of Hue and Cry is a ſtronger Caſe than this is, for there the Servant ought to ſwear that he is robbed, and yet the Maſter ſhall have an Action: And for the word (tranſeuntes) all agreed that although he be at the end of his Journey, or at an Inne in London, yet he is within the Remedy of this Law: And if a Man ſtay in an Inne a month, or a quarter of a year, ſhall not he have an Action if he loſe his Goods?

Doderidge agreed, that if a Man be boarded in an Inne, and his Goods are ſtolen, he ſhall not have an Action upon this Law. And notwithſtanding this Objection, Judgment was given for the Plaintiff upon the Verdict.

Trin. 2 *Car.* In the *King's Bench.*

Sir William Button's *Case.*

Words. *Sir* William Button's *Men have stolen Sheep, and he spake to me that I should not prosecute them.*

SIR William Button a Justice of Peace brought an Action for these words; Sir William Button's Men have stolen Sheep, and he spake to me that I should not prosecute them, and it seems that the Action did not lie, because Sir William did not aver that he is a Justice of Peace, and it doth not appear in what County the said Felony was done, 36 Eliz. One brought an Action for these words; A. is a cosening Fellow, and the greatest Pick-purse in Northamptonshire, and there is not a Purse picked within 40 Miles of Northampton but he hath an hand in it; And the Action did not lie because he did not aver that there were Purses cut.

Jones Justice put this Case, One saith, that A. is as strong Thief as any is in Warwick-Goal, he ought to aver that there is a Thief in Warwick-Goal, or otherwise they are not Actionable.

Doderidge put this Case, There is a Nest of Thieves at Dale, and Sir John Bridges is the maintainer of them, these are Actionable, because it implies Maintenance.

Note that it appeared upon a motion which the Attorney-general made against one Lane (who is a Recusant in Northamptonshire) that a Lease for years made by a Recusant of his own Lands after Conviction, if it be Bona fide will bind the King, but if it be upon Fraud and Covin, then it will not; and Whitlock said, that it is a common Course for Recusants to make Leases after their Indictment and before Conviction.

The same Term in the same Court.

The Case of the Major, Bayliffs and Jurates of *Maidstone.*

IN a Quo warranto depending against the Mayor, Bailiffs and Jurates of Maidstone in Kent, Serjeant Finch of Council with them of Maidstone, put the Case briefly in effect thus: In the Quo warranto against them, it was ordered by the Court that they should have day to plead until a fortnight after Trinity Term, and the truth was that they had not pleaded accordingly, whereupon Judgment was entred in the Roll, and the Writ of Seisin awarded, and Execution thereupon; and afterwards by a private Order in the Vacation by the Chief Justice and Justice Jones, it was ordered that the Judgment should be stayed, and the truth was, that it was never entred amongst the Rules of the Court, and therefore he prayed that the Judgment might not be filed, but that the last Order might be observed, and that they might amend their Plea.

Hendon Serjeant on the other side said, that it could not be, for by the Judgment given the King was entitled to have the Profits of Franchises which he shall not lose; and he cited the Case which is in F. N. B. 21. Error in B. R. cannot be reversed the same Term before the same Justices without a Writ of Error, but otherwise it is in C. B. and he said, that the same course was observed in Eyre, there can be no pleading in Eyre after the Eyre determined, and upon this he cited the Case of 15 E. 4. 7. before the Justices in Eyre, if the Defendant does not come the Franchises shall be seised into the King's hands,

hands, nomine diſtinctionis, and if the Party which ought the Franchiſe doth not come during the Eyre in the ſame County, he ſhall forfeit his Franchiſe for ever, ſo here after Judgment entred, there can be no Plea per que, &c. Finch, We have Order from the Court for ſtay of Judgment, and here no perfect Judgment was given, and this is not without Preſident, and he cited one Chamberlain's Caſe, where the Judgment was nigh to Perfection, &c. but he did not put the Caſe. Crew Chief Juſtice, in this Caſe there was the Aſſent of the Attorney-general, who proſecuted the Quo warranto, and ſo the Caſes put by Hendon to no purpoſe, Jones upon F. N. B. 21. J. took this difference, true it is that the King's Bench cannot reverſe a Judgment although it be in the ſame Term without a Writ of Error, but this is where Error lies in the ſame Cauſe in the ſame Court, as upon Outlawry, but if no Error lies in this Court for the ſame Cauſe, but in Parliament, then the King's Bench may reverſe the Judgment without Writ of Error being the ſame Term. And the Judgment here was ever of Record, for the Roll until it be fixed amongſt other Rolls is no Record.

Where the King's Bench may reverſe its own Judgment without Writ of Error, and where not.

And for the Caſe of 15 E. 4. 7. it is not like our Caſe in reaſon, for when the Eyre is determined the Power of the Juſtices in Eyre is alſo determined, but it is not ſo here, for the Juſtices have Power from Term to Term: But Noy argued further for the King, that it is a Judgment of another Term, and Execution awarded upon it, and ſaid that it is without Preſident that now it ſhould be avoided, and upon the awarding of Execution, the King under his Seal hath averred that Judgment is given which cannot be falſified, and for Chamberlain's Caſe he ſaid that there was an Aſſent in it. Doderidge, The Queſtion which now is moved, is but this, whether a Judgment entred in a private Roll (as a Memorandum) and afterwards there is an Order that the Judgment ſhall not be filed, if the Judgment upon this ſhall be ſtayed: and ſpeaks to it, and by him the Caſe of 15 E. 4. 7. is nothing to this purpoſe, for Juſtices in Eyre were Juſtices by Commiſſion, and they had not the Cuſtody of their Records, and ſo it differs from this Caſe.

When a Roll is become a Record.

And Jones Juſtice (which was not denied) if a Judgment be pronounced here and be not entred, the Judges may alter it the next Term. It was ſaid by Noy in this Caſe that all Franchiſes in England are againſt common Right, and Execution of Juſtice, and for the preſent purpoſe, he cited one Sir John Wells's Caſe, where in a Quo warranto the Defendant had day to plead, or otherwiſe that Judgment ſhould be entred to ſeiſe, and he failed to plead at the day, and the Judgment was not filed, and yet he could not be relieved: But it was ſaid by ſome of the Juſtices, that this was a Caſe of great extremity. But by Hendon it was affirmed in the Exchequer in one Sanderſon's Caſe, and in the principal Caſe the matter was adjourned for a fortnight, and ordered that the Plea ſhould be accepted.

Mich. 2 *Car.* In the *King's Bench.*

Sharp *verſus* Ruſt.

IN an Action upon the Caſe, upon an Aſſumpſit between Sharp Plaintiff, and Walter Ruſt Defendant, upon Non Aſſumpſit pleaded, it was found for the Plaintiff, and it was moved in Arreſt of Judgment upon theſe words in the Declaration, the Defendant (being Father to the Plaintiff's Wife, for whom the Apparrel was bought) ſaid to the Plaintiff, deliver the Apparrel to my Daughter, and I will pay for them, and ſaith not to whom the Payment

ment ſhall be made: And it was argued by Woobrich of Grays-Inne that this is no ſufficient cauſe to ſtay the Judgment, for by neceſſary Implication and Reference of words precedent, the certainty of the Perſon appeareth to whom the Payment ought to be made. And he obſerved that in our Law the time, the Eſtate, the thing, and the Perſon not being ſufficiently expreſſed, yet by neceſſary Coherence and Relation to matter precedent, they are ſometimes made certain enough: 1. For the time, Perkins, p. 496. puts the Rule, if a Condition hath relation to an Act precedent, and no time is limited when it ſhall be done, yet it ought to be done when the Act precedent is done, and therefore if I. S. be bound to me in 20 l. upon Condition that if I enfeoff him of Black Acre, that then he will pay me 10 l. &c. in this Caſe preſently when I have enfeoffed the Obligor of Black Acre he ought to pay the 10 l. notwithſtanding there be no time limited when it ſhould be paid. 2. For the thing being put incertainly, yet the Communication precedent makes this certain, 30 H. 8. Dyer 42. in the Caſe of the Executors of Greenliffe, where it is agreed, that albeit it is not ſhewn what thing is granted, yet it ſhall be the Land of which the Communication was. 3. For the Eſtate, although it be incertain, yet ſometimes it is made certain by the matter precedent, as in the Caſe, Co. lib. 8. A Stewardſhip was granted for life, and afterwards an Annuity was granted for the Exerciſe of that Office, without declaring what Eſtate he ſhould have in that Annuity, and reſolved that he ſhould have the Annuity for life, becauſe he had the Office for life. 4. For the Perſon, the Conſideration ſometimes aſcertains the Perſon, and therefore if Land be given to one by Deed, Habendum ſibi una cum filia donatoris, in frankmariage, this ſhall enure to both, becauſe the Feme is Cauſa donationis, and by intendment of Law the Land and the Feme ſhall be given together to the Man for the Advancement of the Feme, as it is Mich. 2 & 3 Phil. & Mar. Dyer 126. a. 4 E. 3. 4. Plowd. Com. 158. enfeoff him and another, and bind him and his Heirs to warrant, and doth not ſay to whom he ſhall warrant, yet the Feoffee and his Heirs ſhall have advantage of this Warranty, for it cannot have any other intendment: 6 E. 2. Voucher. 258. 22 E. 4. 16. & Kelleway 108. & Coke, lib. 8. Whitlock's Caſe, in a Leaſe for years reſerving Rent, it is the ſureſt way to make the Reſervation to no Perſon in certain, but to leave it to the general intendment of the Law, 15 H. 7. A Man deviſeth that his Land ſhall be ſold for the payment of his Debts, and doth not ſay by whom, they ſhall be ſold by his Executors, becauſe they are liable for the payment of his Debts, but if one deviſe that his Land ſhall be ſold, and ſaith not for the payment of his Debts, the Deviſe is void, becauſe the Law doth not intend in this Caſe to make the Sale, 40 E. 3. 5. 4 E. 3. Fitzherbert Obligation 16. Nota, if a Man be bound in Debt or Covenant by writing, and puts ſuch a Clauſe in the writing. Et ad majorem hujus rei ſecuritatem invenit fidei juſſores quorum unuſquiſque in tot. & in ſolido ſe obligavit, that although none ſpeak there but the Principal in the Writing, if the others put to their Seals, they accept that which the Principal ſpake, and ſo become principal: 2 E. 4. 20. and here in our Caſe it appeareth that the Debt was ſo, and therefore it is reaſon that the Declaration ſhould be ſo, for there cannot be a material difference between the Declaration and the Deed, and eſpecially being upon an Agreement which is to be ruled according to the intention of the Parties, as it is in Plow. Com. 140. a. In our Law if any Parties be agreed upon a thing, and words are expreſſed or written to make the Agreement, although they be not apt words, yet if they have ſubſtance in them tending to the effect intended, the Law ſhall take them of the ſame ſubſtance as words uſual, for the Law regards the intention of the Parties, and here the intent appeareth that the Aſſumption ſhall be made to the Plaintiff, although there want expreſs words, and therefore he prayed Judgment for the Plaintiff. And afterwards the ſame Term Judgment was given for the Plaintiff.

Where a thing incertain may be made certain both in Time, Eſtate and Perſon.

Intention of Parties to be obſerved.

The

The ſame Term in the ſame Court.

Beven *verſus* Cowling.

IN an Action upon the Caſe Littleton moved in Arreſt of Judgment for the Defendant, wherein the Caſe was this, the Defendant aſſumed that if the Plaintiff would defer the payment of a Bond, in which one A. was bound to him, and would not implead him upon it, then he promiſed to pay it, and he doth not ſay that he deferred the Payment until ſuch a day, and therefore this is no valuable Conſideration, ſo that the Action doth not lie, for notwithſtanding this he may implead him preſently, Mich. 12 Jac. Keble's Caſe, A Man promiſeth to pay ſo much in conſideration of a Leaſe at Will, and it was holden no good Conſideration, for by the ſame breath that he creates it, he may defeat it, and Paſch. 8 Jac. Auſtin's Caſe: A Man promiſe that in conſideration he would forbear another, he would pay it, and no time was limited, and therefore it was holden no good Conſideration. Trin. 38 Eliz. Rot. 523. A Man promiſe quod non implacitabit, and avers quod non implacitavit, and becauſe of the uncertainty it was holden no valuable Conſideration. Action upon the Caſe, upon a promiſe, that if he would not ſue ſuch an one, he would pay it, where good and where not.

Doderidge Juſtice, If there be no Conſideration at the time, or no cauſe of Action, the forbearance afterwards will not make it Actionable, and he ſaid that it had bèn adjudged in this Court, that a Conſideration to forbear for a little time is not good, but by ſome to forbear for a reaſonable time is good. But in the principal Caſe upon the hearing of the Declaration read, it appeared, that it was, that he ſhould never implead him upon the ſaid Obligation, ſo that if the Plaintiff brings an Action upon the Obligation, the Defendant here may have an Action upon the Caſe againſt him. Alſo it was non implacitabit, and this ſhall be taken indefinitely, quod nunquam implacitabit, and therefore the Judgment was affirmed, for otherwiſe the Plaintiff ſhall both take advantage of this Promiſe and of the Bond alſo, and here he hath in a manner forſaken the benefit of his Bond, and hath betaken himſelf to the benefit of this Aſſumpſit.

By Jones and Whitlock Juſtices, if A. be bound to me, and I enter into Bond to him, that I will not ſue this Obligation, I cannot ſue him upon the firſt Obligation, without forfeiture of my Bond: and by Doderidge, if an Obligation be forfeited, and I ſay to the Obligée, do not ſue the Obligor, or do not implead him, an Action upon the Caſe lies againſt me.

The ſame Term in the ſame Court.

Arnold *verſus* Ditchton.

IN an Action upon the Caſe, and Non Aſſumpſit pleaded, it was found for the Plaintiff, and Noy moved in Arreſt of Judgment, that there was no Conſideration to maintain this Action, the Caſe being thus: Arnold having married the Daughter of the Defendant's Teſtator, the Teſtator promiſed to give him 40 l. and Meat and Drink for a year, and a Feather-bed and Bolſter, and afterwards the Teſtator in conſideration that the Plaintiff would forbear to ſue him all his life for it, promiſed that he ſhould have as good a Portion at his death as any of his Children, and the Plaintiff declares that he Aſſumpſit.

he gave to one Tho. P. one of his two Sons 200 l. and that he left him at the time of his death, but 30 l. but when he gave to Tho. P. the 200 l. appears not, peradventure it might be in his life time, and this Promiſe doth not extend to that which he had given before, as if a Man be bound to keep a Goal, and that no Priſoner ſhall eſcape, this only extends to a future Keeping, and future Eſcapes, and not to other Eſcapes which were before.

True it is, that ſometimes the Law will alter the ſenſe, as in the Caſe of 32 H. 6. where a Man is bound that his Feoffees, &c. And at another day Doderidge ſaid, that the firſt Promiſe was but an Inducement to the ſecond, and the Defendant hath pleaded Non Aſſumpſit to the laſt Promiſe, and then comes the Plaintiff and ſhews that he gave ſuch an one 200 l. and doth not ſhew when this was given, and this may be before the Promiſe, and therefore I conceive the Declaration is not good: Jones agreed that the Declaration is not good, for admit that in this Caſe he had given to all his Children but one, great Portions before the ſaid Promiſe, and had given a ſmall Portion to one after the Promiſe, the Plaintiff now ſhall have but according to the ſaid Promiſe, and it is alledged here, that he gave to ſuch an one 200 l. which may be before the Promiſe, and therefore the Breach not well laid.

Whitlock contra: and that the Plaintiff ſhall have according to the beſt Gift in this Caſe, whether it were before or after the Promiſe, and that upon the intention of the Promiſe; for the intention is, that the Plaintiff ſhould have as good a Marriage Portion with his Daughter, as any other of his Children ſhould have: But by Doderidge this Conſtruction cannot be made without offering violence to the words, for then daret ſhould be for dediſſet, and for any thing which appeareth he had a Portion before, and this was but a Super-addition.

Jones put this Caſe: I am bound to enfeoff J. S. of ſo much Land as I will enfeoff J. D. this extends not to a Feoffment which I have made to J. D. before, but only to a Feoffment which I ſhall make to him afterwards, which was not denied by Whitlock, and it was adjourned.

The ſame Term in the ſame Court.

Barker *verſus* Ringroſe.

Words. *Thou art a Bankrupt Rogue.*

BArker brought an Action upon the Caſe againſt Ringroſe, and declared, that whereas he was of good Fame, and exerciſed the Trade of a Wool-winder, the Defendant ſpake theſe ſcandalous words of him, that he was a Bankrupt Rogue: and it was moved in Arreſt of Judgment, that thoſe words were not Actionable; for the words themſelves are not Actionable, but as they concern an Office or Trade, &c. and it appeareth by the Statute of 27 E. 3. that a Wool-winder is not any Trade, but is but in the nature of a Porter, ſo that the Plaintiff is not defamed in his Function, becauſe he hath not any: alſo it is not averred that he was a Wool-winder at the time of the words ſpeaking.

A Wool-winder what he is.

Jones Juſtice: If one ſaith of a Wool-winder, that he is a falſe Wool-winder, Action upon the Caſe lieth; and it was demanded by the Court, what a Wool-winder was? and it was anſwered that in the Country he is taken to be a Wool-winder that makes up the Fleece, and takes the Dirt out of it: and a Wool-winder in London opens the Fleeces, and makes them more curiouſly up, and in London they belong to the main of the Staple.

Doderidge

Doderidge, If one ſaith of a Sher-man, that he is a Bankrupt, Action lies, and ſo it hath been adjudged of a Shoe-maker: and note that if one ſaith of any Man (who by his Trade may become a Bankrupt within the Statutes) that he is a Bankrupt, an Action lies, as of a Taylor, Fuller, &c. And the Court ſeemed to incline, that in this Caſe (being ſpoken of a Wool-winder in London) the Action lies: But Mich. 3 Car. the Caſe being moved again, the Court was of Opinion, that the Action could not lie, and would not give Judgment for the Plaintiff. In what Caſe to call a Man Bankrupt is Actionable.

The ſame Term in the ſame Court.

NOta by Doderidge and Jones, Juſtices, that upon the principal Judgment reverſed, the Outlawry is alſo Ipſo facto reverſed: Alſo if an Outlawry be awarded, if it be not per Judicium Coronator. (unleſs it be in London) the Outlawry is void. Outlawry reverſed upon Reverſal of the principal Judgment.

It was demanded by the Juſtices, when the Outlawry and Judgment are affirmed, how the Entry is? And it was anſwered by Broome Secondary, that the Entry is general, Quod judicium affirmetur in omnibus: and this ſufficeth.

But if the Judgment be affirmed, and the Outlawry reverſed, then the Entry is, Quod judicium affirmetur & Utlagario caſſetur.

The ſame Term in the ſame Court.

Calfe *and others, verſus* Nevil *and others.*

A Scire facias was brought by Joſeph Calfe and Joſhua, Executors of A. againſt Nevil Davyes and Bingley, and the Caſe was this; They became Bail to one Hall (who was condemned in an Action to the Teſtator of the Plaintiff) that the ſaid Hall ſhould either render his Body to Priſon, or that he ſhould ſatisfie the Judgment, the Defendants plead, that after the Scire facias returned, and preſently after the Judgment, the ſaid Hall brought a Writ of Error in the Exchequer-Chamber, hanging which, the ſaid Hall, reddidit ſe priſonæ in exoneratione manucaptorum ſuor. and there died; and the Plaintiff demurred upon this Plea, becauſe it was double, and Calthrop argued for the Plaintiff, that it was double, or rather treble.

1. That Reddidit ſe priſonæ.
2. That he was impriſoned.
3. That he died in Priſon.

And to prove the Plea double in this Caſe, he cited 13 H. 8. 15. 16. 4 E. 4. 4. 21 H. 7. 10. The ſecond matter that he moved againſt the former was, that pendant the Writ of Error reddidit ſe priſonæ, and doth not conclude upon the Record, & hoc paratus eſt verificare, as he ought to have done, and for this he cited 7 H. 8. Kelleway 118.

If J. S. be bound in a Recognizance, that A. ſhall appear ſuch a day before the King's Juſtices at Weſtminſter, if his Appearance be not recorded he ſhall not have any Averment, by Bricknell and Conisby, and in 30 Eliz. It was one Wicks's Caſe, which is ours in effect in caſe of Bail, Dyer 27. 6 E. 4. 1. 2. For the matter in Plea is nought, 1. Becauſe by the Writ of Error brought, the Scire facias againſt the Bail is not ſuſpended, becauſe the Bail is a diſtinct Record; and upon this he cited the Caſe of the Ambaſſador

of Spain againſt Captain Gifford, which was, Trin. 14 Jac. That by the Writ of Error brought the Bail was not ſuſpended, and he ſaid that it was ſo reſolved alſo in Goldſmith and Goodwin's Caſe.

2. For the Render of the Principal to Priſon, it is not good, becauſe it doth not appear upon Record: and for this he cited one Auſtin and Monk's Caſe, which is in 14 Jac. In Scire facias againſt the Bail, it is pleaded that the Principal had rendred himſelf to Priſon, and upon the matter it appeared that the Render was upon Candlemas-day, which is not Dies juridicus; and ſo the Court this day had no power to commit him to Priſon, for which the Plea was adjudged void.

3. For the death it is no Plea; the Bail by it is not diſcharged, becauſe he hath not rendred himſelf in due time: and for that he cited Juſtice Williams and Vaughan's Caſe, which was Mich. 3 Jac. where in Scire facias againſt the Bail they pleaded that the Principal was dead, and thereupon the Plaintiff demurred, and in this Caſe two Points were reſolved.

1. There was no Capias mentioned to have iſſued againſt the Principal, and yet reſolved that a Scire facias would lie againſt the Bail.

2. That the Plea in Bar is not good, becauſe it may be that the Principal died after the Capias awarded, or after the Return thereof, becauſe it appeareth that there was once a default in the Principal, and the Bail forfeited, and no Plea afterwards would diſcharge it, and upon this he put this Caſe:

A Priſoner eſcape out of Priſon, the Goaler makes freſh ſuit, and before he hath taken him, the Priſoner dies, this is the Act of God, and yet becauſe it was once an Eſcape, an Action of Eſcape lies againſt the Goaler: Jermy for the Defendant; and he remembred a Caſe which was Hil. 20 Jac. Cadnor and Hilderſon's Caſe, that by the Writ of Error, the Bail is ſuſpended. Nota, that it was agreed by the Court in this Caſe, that by the Writ of Error brought in, the Bail was not diſcharged, becauſe it is incertain whether the Judgment ſhall be reverſed or not: Alſo it was agreed, that if the Principal dies before a Capias awarded againſt him, that the Bail is diſcharged: It was alſo agreed by the Court, that the Plea was not double, for the firſt matters are but an inducement to the laſt; and yet by Doderidge, If ſeveral matters are pleaded in Bar, and there be not any Dependency on them, the Plea is double, although none of them be material but one.

Where a Plea is double, and where not.

Jones Juſtice cited one Hobs and Tadcaſter's Caſe; which was 43 Eliz. in B. R. where after a Writ of Error brought, a Scire facias iſſued againſt the Bail, and upon Nihil returned, the Plaintiff to the Scire facias brought in an Audita Querela, and there the matter came in queſtion, whether upon the Judgment the Principal ought preſently render himſelf to Priſon, or ſhould ſtay until a Capias awarded againſt him, and there it was reſolved by Popham and all his Companions, that the Principal is not bound to render himſelf to Priſon, until a Capias be taken out; ſo that if he dies after the Judgment, and before the Capias awarded againſt him, the Bail be diſcharged.

Alſo in the Principal Caſe here it was reſolved, that a Scire facias does not lie againſt the Bail, until a Capias be awarded againſt the Principal: and becauſe no Capias in this Caſe was awarded againſt the Principal (which could not be by reaſon of the Writ of Error) before his death. And alſo the Plaintiff in his Declaration ought to have averred, and ſhewn that the Capias was awarded againſt the Principal. For theſe reaſons Judgment was given quod querens nihil capiat per Billam.

The ſame Term in the ſame Court.

Reynor *verſus* Hallet.

IN an Action upon the Caſe for theſe words, viz. Reynor is a baſe Gentleman, he hath four Children by his Servant Agnes, and he hath killed them all, or cauſed them to be killed: and after a Verdict for the Plaintiff, it was moved in Arreſt of Judgment by Jermy, that the words were not actionable:

Words. *Reynor is a baſe Gentleman, he hath four Children by his Servant* Agnes, *and he hath killd, or cauſid them to be killd.*

For, 1. As to the firſt words, Baſe Gentleman, they are but words of Choler.

2. The next words, He hath four Children by his Servant Agnes, cannot be actionable, for although ſhe were once his Servant, yet ſhe might be afterwards his Wife.

3. The Plaintiff hath averred in his Declaration, that he hath lived continently, and then he cannot have Children by his Servant Agnes, and then the words are not Actionable.

And 4. For ſaying he hath killed them is not actionable, and upon this he cited one Snag's Caſe, Co. lib. 4. who brought an Action for theſe words, Thou haſt killed thy Wife; and it appeared by the Declaration, that his Wife was alive, and therefore it was reſolved, that the words were not Actionable.

And as to the laſt Exception, it was ſaid by Aſhley Serjeant on the other ſide, that albeit the Plaintiff hath averred in his Declaration, that he lived continently, and ſo in a manner confeſſed that he had no Children, this is but for the Aggravation of the Offence of the Defendant: as when an Action is brought for calling one Thief, he avers that he lived honeſtly, and yet the Action will lie. But I confeſs if the Plaintiff had averred that he never had any Child, then it would be like to Snag's Caſe, Co. lib. 4. 16. a. and that the Action would not lie.

But in Anne Davyes Caſe, there ſhe averred that ſhe was a Virgin of good Fame, and free from all ſuſpition of Incontinency; and the Defendant ſaid that a Grocer had got her with Child: Owen Ward's Caſe in Cook's Book of Entries hath the ſame Declaration as this, and it was the Preſident thereof. But Jermy moved another Exception upon theſe words, He hath killed them, and doth not ſay Felonice, which is not good, for he might kill them in Execution of Juſtice, which is juſtifiable, Trin. 2 Jac. Willer's Caſe in the Court, it was adjudged, that for theſe words, Thou haſt ſtolen a piece, and I will charge thee with Felony, an Action lies not, becauſe a Piece is a word of doubtful ſignification.

And Trin. 20 Jac. It was reſolved that theſe words (Agnes Knight is a Witch) were not actionable: but it was anſwered by the other ſide, that upon the whole frame of theſe words, they cannot be intended but to be ſpoken maliciouſly, and there can be no pretence of lawful killing of Children: Doderidge, All the words joyned together are actionable; but theſe words only conſidered, He hath four Children by his Servant Agnes, are not actionable, and albeit he doth not alledge it Felony, yet this is a Scandal, and good cauſe of Action. Jones agreed, and yet he conceived, that for ſaying ſingly, that one hath a Baſtard, an Action lies not, albeit the having of a Baſtard be puniſhable by the Statute of 18 Eliz. cap. 1. But by him he hath killed the King, ſhall be taken in pejori ſenſu: otherwiſe it is, if the words of themſelves be indifferent, as (Pope) and this word ſhall not be the rather taken in pejori ſenſu, having relation to all the Sentence: for the contrariety of the Declaration, it ſeems to me that the Declaration is good enough; but if one ſaith, Thou haſt killed J. S. where in truth there never was ſuch a Man, it is not actionable.

But here the Averment of the Plaintiff is more general, Ubi re vera, he is not guilty or incontinent, which is a general Allegation: but if he had averred Ubi re vera, he never had any Child, there peradventure the Action would not lie, but here it will: Whitlock Justice agreed, and he said that the first words, hath had four Children by his Maid Agnes are actionable, and for the other matters they agreed, whereby Judgment was given for the Plaintiff.

The same Term in the same Court.

This Term in the Common Place, Serjeant Hendon cited this Case to be adjudged 4 Jac. A Copy-holder made a Lease for years by Licence, and the Lessee dies, that this Lease shall not be accounted Assets in the hands of the Executors, neither shall it be extended: But the Case was denied by Justice Hutton and others, and that an Ejectione firmæ lies of such a Lease. But he said, that if a Copy-holder makes a Lease for years by Licence of the Lord, and dies without Heir, the years not expired, the Lord notwithstanding this may enter, for the Estate out of which this Lease was derived is determined: But Yelverton Justice was contra, because this Licence shall be taken as a Confirmation of the Lord, and therefore the Lease shall be good against him, and where (as I heard) it was argued by all, that if a Copy-holder makes a Lease for a year, this is a Lease by the Common Law, and not customary, and shall be accounted Assets in the hands of the Executors of the Lessee.

The same Term in the King's Bench.

Nota, Upon Evidence to a Jury between Busfield and Byburo, the Case appeared to be this, upon a Devise with these words, I will and devise that A. and B. my Feoffees shall stand seised, and be seised to the use of John Callis for life, the Remainder, &c. And the truth was that he had no Feoffees: and the Opinion of the whole Court (nullo contradicente) was, that this is a good Devise to John Callis, by reason of the intention. 38 H. 8. Bro. Devise 48. & 15 Eliz. Dyer 323. were urged for the proof of it, and by Doderidge the Case of 15 Eliz. is more strong than our Case is: Lynch made a Feoffment to his own use, and afterwards devised that his Feoffees should be seised to the use of his Daughter A. who in truth was a Bastard, and yet this is a good Devise of the Land by intention, for by no possibility they can be seised to his use.

Mich.

Mich. 2 *Car.* In the *King's Bench.*

Lemaſon *and* Dickſon's *Caſe.*

Trin. 2 *Car. Roll.* 1365.

THE Caſe was this, One Parcevall Sherwood was indebted to Suſan Clarke, who brought an Action of Debt, by a Bill of Middleſex, which is in nature of a Writ of Treſpaſs againſt him, and Sherwood upon a mean Proceſs was arreſted by the Defendant (being Bayliff of the Liberty of White-Chappel) and being in his cuſtody, he ſuffered him to eſcape: Afterwards Suſan Clarke made the Plaintiff her Executor, and died, and then the Plaintiff brought an Action upon the Caſe againſt the Defendant upon the ſaid Eſcape; and upon Iſſue joyned, it was found for the Plaintiff.

And Calthrop of Council with the Plaintiff, moved, that the Action will well lie, for the Teſtator himſelf might have had either an Action of Debt, or upon the Caſe, upon the ſaid Eſcape, and therefore the Executor may have the ſame Remedy, and that by the Equity of the Statute of 4 E. 3. cap. 7. which gives an Action to Executors pro bonis aſportatis in vita Teſtatoris. And by 14 H. 7. 17. this Statute ſhall be taken by Equity, and Adminiſtrators, who are in the ſame Miſchief ſhall have the ſame Remedy, albeit they be not named in the Statute, old Nat. Brevium 103. An Executor ſhall have a Quare impedit for a Diſturbance made in vita Teſtator. and 7 H. 4. 6. and old Nat. Brev. 123. b. An Executor ſhall have an Ejectione firmæ of an Oulter made to the Teſtator, 17 E. 3. Executors 106. An Executor ſhall have a Replevin of Goods taken in vita Teſtatoris, and it hath been often times reſolved, that an Executor ſhall have a Trover and Converſion of Goods taken and converted in vita Teſtator.

Doderidge demanded of him the reaſon why an Action upon the Caſe upon an Eſcape in the life of the Teſtator, ſhould not lie againſt an Executor, to which he anſwered, becauſe it was a meer perſonal Wrong. Doderidge, So is the Wrong here; and he ſaid that an Executor cannot have an Action vi & armis, for a Treſpaſs done in vita Teſtatoris, and in this Caſe becauſe the Eſcape was in vita Teſtator. it is a perſonal Wrong to him, for which the Executor ſhall not have an Action upon the Caſe.

But it had been otherwiſe, if the Eſcape had been after the death of the Teſtator, and the Statute of 7 E. 3. doth not extend to it, becauſe this Statute is only for Goods, but I agree to the Caſe of Trover and Converſion. Jones Juſtice, if this Action upon the Caſe will not lie by the Executor, it would be a miſchievous Caſe, for as ſoon as the Creditor dies, the Goaler will and may ſuffer the Priſoner to eſcape, becauſe none can have an Action againſt him, but as it appeareth by the Caſe of 15 Eliz. Dyer.

The Caſe is as miſchievous for the Creditor, if the Goalor ſuffers an Eſcape, and dies, for there no Action lies againſt the Executors. And for the Caſe of Quare impedit, I agree to it, and ſo it was reſolved in Brokesby's Caſe, 31 Eliz. that an Executor ſhall have a Quare impedit for a Diſturbance made in vita Teſtator. if the Avoidance be a Chattel veſted, and therefore within the Equity of the Statute, which gives an Action de bonis Teſtator. and he was commanded to move it another time.

And at another day in Hillary Term next after, Grigs ſaid for the Defendant, that the Executor cannot have this Action for an Eſcape in vita Teſtator. becauſe it is a meer perſonal Action given to the Teſtator, & moritur cum perſona, and cited 15 Eliz. Dyer, Whitaker's Caſe, and that it is meerly perſonal appeareth by 10 Eliz. Dyer 271. Where an Executor ſhall not be charged with

with an Eſcape in vita Teſtator. generally, where not Guilty is a good Plea, there an Action doth not lie for it againſt Executors. And this Caſe is not within the Equity of the Statute of 4 E. 7.

But it hath been objected that an Ejectione firmæ is within the Equity of this Statute for the Executors to have it 7 H. 4. 6. but the reaſon there is, becauſe it is to recover the Term it ſelf; and not Damages only: and upon the ſame reaſon an Action of Covenant, upon a Covenant broken in the life of the Teſtator, is maintainable by an Executor, and that alſo is the reaſon of the Caſe of the Quare impedit, becauſe there the Preſentation is to be recorded: but in our Caſe Damages only are to be recorded upon the Eſcape, and ſo they are not alike.

2. The Arreſt here is upon a mean Proceſs, and upon a Bill of Middleſex, which is but in nature of a Treſpaſs before Declaration, and I conceive that if one be taken by a Cap. ad ſatisfaciendum at the Suit of one, albeit the Party at whoſe Suit he is taken, dies, yet he ſhall be detained in Execution, but I conceive the Law to be otherwiſe upon a Cap. ad reſpondend. and albeit the Plaintiff ſaith that the Arreſt was, ea intentione to declare againſt him in an Action of Debt, yet an intent is a ſecret thing, and albeit the Executor repreſent the Perſon of the Teſtator, yet he cannot follow it, and it is impoſſible to prove the intent.

Jermy for the Plaintiff ſaid, that there is a difference, where an Action is brought by, and where againſt Executors, and this appeareth by Littleton's Caſe, that an Action of Account doth not lie againſt Executors for want of privity as to that purpoſe, but it is clear that Account lies by Executors, becauſe this is a point of Intereſt: And here in this Caſe, the Teſtator had Intereſt in the Body by the Arreſt, and this appeareth in Hichcock's Caſe, cited in Hargrave's Caſe in the Lord Cook's 5th Report, and by the Arreſt the Body of the Party is as a Chattel in the Teſtator: and he compared this to the Caſe of 7 H. 4. 2. & 3. Fitzherbert's Executors 52. An Executor ſhall have a Raviſhment of Ward for a taking in the time of the Teſtator.

And 7 H. 4. 6. and a Caſe cited by Hankford, that if one enter upon a Statute Merchant, who dies, his Executor ſhall have an Aſſiſe, and therefore I conceive, that if a Tenant by Elegit be ouſted and bring an Aſſiſe, if the Executors be ouſted again, he ſhall have a Reditſeiſin upon the firſt Ouſter, becauſe the Intereſt continues in him which was in the firſt Teſtator, and it is to be obſerved in our Law, that the Law enlargeth it ſelf to give to Executors the ſame Remedy which the Teſtator had, and thereupon he cited Co. lib. 6. 80. a. & 3 Eliz. Dyer 301.

And in our Caſe the Body of the Party was in the Teſtator, as a Gage till Appearance, ſo that it was not only a perſonal Tort, for he had an Intereſt, and this appeareth by Co. lib. 5. 27. by a Caſe put in Ruſſel's Caſe there, and if the Executors ſhall not in this Caſe have an Action, it would be very miſchievous, for ſo the Goaler ſhall ſuffer Eſcapes diſpuniſhable, 20 E. 3. Fitz. Executors 74.

But as to this Reaſon it was anſwered by Jones Juſtice, that the ſame Miſchief is of the other ſide, if the Goaler ſuffer an Eſcape and dies, an Action lies not againſt his Executors.

Calthrop on the ſame ſide cited F. N. B. 121. a. that a Man condemned in Debt, and impriſoned, if the Goaler ſuffer him to eſcape, the Party, or his Executor may have Debt againſt the Goaler: And he ſaid, that at Common Law, Debt lay againſt a Goaler upon an Eſcape, as appears in Fitz. Debt 127. 38 H. C. placit. 36. And if it were a Debt in the Teſtator, then Executors may have an Action upon it.

But by Doderidge Juſtice in the ſaid Caſe, Debt lies not at Common Law, for to what purpoſe was the Statute made? But for the Point in queſtion, his ſudden Opinion was, the Executor ſhall have this Action, and that it is

within

within the Equity of the Statute of 4 E. 3. for it is a Wrong, although it were upon mean Proceſs, and the Tort continues as to the Executor, for every thing which makes to the hindrance of the Execution of the Will, is wrong to him, and the performance of Wills is much favoured, becauſe it is the laſt deſire of the Party who is dead, and it is for the Publick Weal, becauſe by this means Debts ſhall be paid.

And many Caſes are within the Equity of the Statute, that are not within the Letter, as theſe Caſes which have been put, all which he agreed: Jones Juſtice on the ſuddain was againſt it, and that this Caſe is not within the Equity of the Statute of 4 E. 3.

There are divers Actions which are not helped by this Statute, as Treſpaſs for cutting of Trees, Battery, and the like; for the Statute is, de bonis & Catallis aſportat' in vita teſtator. An Executor ſhall have a Replevin of Goods taken in vita teſtator. for by this he recovers the thing it ſelf, and ſhall have Detinue, but ſhall not have Treſpaſs, for he cannot punish the Wrong done in the life of the Teſtator.

The Statute of 4 E. 3. is much enlarged by Equity, as the Caſes which have been put, and extend alſo to Uſurpation in the life time of the Teſtator, as appears in Ruſſel's Caſe, Co. lib. 5. & 32 & 33 Eliz. in C. B. in the Biſhop of Chicheſter's Caſe, that if the Teſtator dies within ſix months after the Uſurpation, the Executor ſhall have a Quare impedit. And the Caſe of Trover and Converſion in vita Teſtator. was maintained by Executors, and it was ſo reſolved 41 & 42 Eliz. in the Countels of Rutland's Caſe in both the Benches, becauſe this is in nature of a Writ of Detinue.

Now for the Caſe in queſtion, I conceive that it is not within the Statute of 4 E. 3. becauſe it is neither bona nor catalla. Whitlock Juſtice contra, and that this Statute is very much taken by Equity, & præter literam, though not contra literam.

But Nota, that all agreed, if it were upon an Eſcape after Judgment, that the Action would lie by the Executors, according to the Caſe of F. N. B. 121, a. But the principal Caſe was adjourned.

And afterwards Trin. 3 Car. It was argued again by Jermy for the Plaintiff, and the ſole Point was, A Man taken by Latcat, and being in the cuſtody of the Sheriff, eſcapes, the Party at whoſe Suit he was arreſted dies, whether his Executor ſhall have an Action upon the Caſe upon the Eſcape, and he conceived that he might.

It hath been objected, that it is a perſonal Wrong, and as an Action doth not lie againſt Executors upon an Eſcape, in vita Teſtator. ſo not by Executors: To which I anſwer, that it is not merely Perſonal, but mixed with an Intereſt.

At the Common Law, an Executor could not have Treſpaſs for Goods taken in vita Teſtator, but yet he ſhould have a Replevin, 33 E. 3. Fitz. Avowry 257. and Executors 106. So at Common Law, a Surreſtor ſhould not have Treſpaſs for Goods carried away in the life time of his Predeceſſor, but he ſhall have a Replevin, 9 H. 6. 25. but this was remedied by the Statute of Marlebridge, cap. 28. and ſo upon the Statute of 4 E. 3. de bonis aſportat. &c. Trover and Converſion hath been adjudged within the ſaid Statute, for the Statute hath always been liberally expounded. 7 H. 4. 2. Fitz. Executor 52. An Executor ſhall have Raviſhment of Guard taken away in vita Teſtator. and alſo other Statutes which do not name Executors, have been expounded to extend to them, as the Statute of 23 H. 8. which gives Attaint, 3 Eliz. Dyer 201. Co. lib. 6. 8. Executors ſhall take benefit of the Pardon of 43 Eliz. & 6 E. 6. Bendloe's Reports (which is cited there) Executors ſhall have Reſtitution upon the Statute of 21 H. 8. and Co. lib. 5. 31. and 27. Ruſſel's Caſe, an Executor ſhall have Trover upon Goods loſt in vita Teſtator. and this is in manner and nature of a promiſe to have the Party in Court at the day, and it

Trin. 14 *Jac. Probe* and *Mayne's* Caſe, if the Party eſcape being arreſted upon mean Proceſs, the Sheriff is not liable for the Eſcape, otherwiſe if upon an Execution.

it is clear that upon an expreſs Aſſumpſit to the Teſtator, an Executor ſhall have an Action upon the Caſe, and it hath bèn in manner agrèd by the Court, that if it had bèn an Eſcape of one in Execution, that the Action would have lien by the Executor: and I ſée no difference betwèn that and our Caſe. And it was adjourned.

The ſame Term in the ſame Court.

UPon an Information by Heath the King's Attorney, againſt two Men of the County of Huntington in the name of all the County, that they ought, and uſed to repair the Bridge of S. Eedes in the County of Huntington, Iſſue was joyned by the County, whether they ought and uſed to repair this Bridge; and the Attorney gave no Evidence, but put it upon the other ſide, for he ſaid by the Statute of 22 H. 8. cap. if it doth not appear that any particular Perſon, or Town ought to repair a Bridge, by reaſon of Tenure, or otherwiſe, that then the County where this is, ought to repair it.

But Nota, that the Iſſue was, whether they ought to repair the whole Bridge, and yet upon the Evidence it appeared, that only two Arches and an half of the Bridge was in the County of Huntington, and two Arches and an half in the County of Bedford, and the Jury found generally, that only two Arches and an half of the Bridge were in the County of Huntington, and ſay nothing where the reſt was, for they could not find a thing in another County.

And alſo they found that the County of Huntington ought to repair all, but not that they uſed to repair it: And at another day Hedley Serjeant moved for the County, that the Verdict was not good, becauſe the Iſſue was, whether they ought to repair, and a tempore cujus contrarium, &c. had repaired, &c.

And the Jury hath found that they ought to repair, which is but the half of the Iſſue, and alſo they find that they ought to do it, which is a Queſtion in Law, and therefore void, 8 H. 6. 3, 4.

Secondly, The Iſſue is, whether they ought to repair the Bridge, and the Jury hath found, that they ought to repair two Arches and an half only, &c. and the Bridge is an entire thing.

The Attorney anſwered, that for the firſt Exception the Caſe of 27 Aſſ. Pl. 8. is againſt it.

And for the laſt, the very Caſe of 43 Aſſ. Pl. 37. is againſt it, and therefore the Court conceived the Verdict good, notwithſtanding theſe Exceptions, Doderidge Juſtice, by the Common Law before the Statute of 22 H. 8. if no Man by reaſon of Tenure or otherwiſe ought to repair a Bridge, the County ought to do it; like to the Caſe of 8 E. 4. Fiſhers by the Law of Nations may dry their Nets upon the Land of any Man.

The

The ſame Term in the ſame Court.

DOctor Cleland brought a Writ of Error against Baldock, upon a Judgment given in where the Plaintiff declared that the Defendant, in conſideration that he would do all his Commands, honeſtly and truly for the ſpace of a year, aſſumed to pay him 10 l. and further declared, that he had done all his honeſt and lawful Commands, and this Promiſe being found by Verdict, Judgment was given againſt Doctor Cleland, and thereupon he brought this Writ of Error, and Green aſſigned two Errors. Intr. Hil. 22 Jac. Rot. 590.

1. The Aſſumpſit is, that he ſhall do all his Commands honeſtly and truly, and he hath declared that he hath done all his lawful and honeſt Commands, and he may do honeſt Commands, and yet not honeſtly.

2. It is ſaid that Jurator. Affident dampna, and it is not ſaid occaſione tranſgreſſion. prædict. and it is againſt all Precedents: But Nota, that there were theſe words, ex hac parte oppoſita, and therefore the Exceptions are diſallowed by the Court, and the firſt Judgment affirmed.

The ſame Term in the ſame Court.

Secheverel *verſus* Dale.

THis Caſe was ſent out of Chancery to this Court to know the Law therein, and in Treſpaſs the Caſe was this: Henry Secheverel, the Father ſeiſed in Fee, levied a Fine to A. and B. in Fee, to the uſe of himſelf for life, abſque impetitione vaſti, with power to cut and carry away the Trees, and to make Leaſes for 21 years, or three Lives, the Remainder to the uſe of John Secheverel his eldeſt Son for life, without Impeachment of Waſte, with the ſame Powers.

Henry the Father made a Leaſe to one (under whom the Plaintiff claims) for three Lives, rendring the antient Rent, excepting all the Trees (unleſs thoſe which ſhall be for Cropping, Lopping and Fewel) Henry the Father dies, John the Son in the next Remainder cut certain Trees Victorin Secheverel who claims by the Leaſe made by the Father, brings Treſpaſs, and two Queſtions were moved.

1. Whether Leſſee for life without Impeachment of Waſte, may make a Leaſe excepting the Trees, and it was objected by the Council of the Plaintiff, that he could not, becauſe this ſecond Leaſe ariſeth out of the firſt Fine, and out of the Eſtate of the Conuſor: But the Court prima facie, was of Opinion that he might well make ſuch a Leaſe with ſuch an Exception, ſee Co. lib. 11. Lewes Bowls his Caſe, and Doctor and Student, lib. 1. cap. 1. and by Doderidge Juſtice, the Leaſe ariſeth out of both the Eſtates. Jones Juſtice, ſuppoſe the Leſſee abſque impetitione vaſti, aſſign over all his Eſtate, might he cut the Trees? and it was conceived that he might; for by Doderidge he hath power to diſpoſe of the Trees, as it was reſolved in Lewys Bowls his Caſe. Jones, He hath no property in the Trees, until they be cut. Crew Chief Juſtice, Admit a Stranger cut the Trees, who ſhall have them? By all the Court the Leſſee without Impeachment of Waſte ſhall have them.

2. Point, Tenant for life without Impeachment of Waſte, with power to cut and carry away the Trees, and make Leaſes for 21 years or three lives, the Remainder for life to J. S. without Impeachment of Waſte, &c. Tenant for life makes a [illegible] for three Lives, and dies, whether he in Remainder for life, without Im[illegible]ment of Waſte, with power to cut the Trees, may cut the Trees, and take them during the Leaſe for three Lives, and the Court ſeemed to be of Opinion that he might: And Leving of Council with the Plaintiff, argued, that when Tenant for Life without Impeachment of Waſte with power to cut the Trees, and to make Leaſes for 21 years or three Lives, makes a Leaſe for three Lives, excepting the Trees, that this is a void Exception, becauſe he hath no Intereſt, but a bare Authority, 27 H. 6. Fitz. Waſt. 8. Statham tit. Waſt. 1. makes this a Quere (which Statham was once the Owner of the Land in queſtion.) A Man makes a Leaſe for life without Impeachment of Waſte, a Stranger cuts Trees, the Leſſee brings Treſpaſs, he ſhall recover no Damages for the value of the Trees, becauſe the Property belongs to him in the Reverſion, and he may diſpoſe of them, quere Dyer 284. Daunſley and Southwel's Caſe, Co. lib. 11. Lewys Bowles Caſe, that ſuch a Leſſee may take Trees which are blown down, and 3 H. 6. 45. Mich. 41. and 42 Eliz. C. B. Leechford againſt Sanders in an Action of Waſte upon a Leaſe made to Sanders for life, with a Proviſo that the Plaintiff might diſpoſe of the Trees during the Eſtate, and reſolved that the Action lies not, for notwithſtanding this power, the Trees are demiſed to the Leſſee alſo, ſo here when the Trees are excepted, he hath no Intereſt, but only an Authority.

2. The Exception is void for another reaſon, becauſe when ſuch a Leſſee, makes ſuch a Leaſe, this is not his Leaſe, but it hath its Operation out of the Original Fine, and he who makes this hath but the Nomination, and therefore cannot add a Condition or Exception to it. And if the ſecond Leaſe ſhall have its being out of the Eſtate of the Leſſee for life, then there ſhall be an Uſe upon an Uſe, as appears Co. lib. 1. 134. and that the Law will not allow. 15 H. 7. and Co. lib. 1. Albany's Caſe, If a Man devile, that his Executors ſhall ſell his Land, they cannot add a Condition or Exception to this Sale, as an Attornment upon a Condition ſubſequent is void, Coke, lib. 2. Tooker's Caſe.

3. This Caſe may be reſembled to the Caſe of Copy-holds, which is in Co. lib. 8. 63. b. in Swayne's Caſe: If a Lord takes a Wife, and afterwards grants Lands by Copy, according to the cuſtom, and dies, his Wife ſhall not be endowed of this Land, for albeit her Title of Dower was before the Grant, yet the Title of Copy-hold (which is the cuſtom) is elder than the Title of Dower; ſo in our Caſe, the Title of the ſecond Leſſee is derived out of the Eſtate of the Conuzees, and therefore ſhall not be clogged with the Exceptions of Leſſee for life, without Impeachment of Waſte.

4. This Privilege to cut the Trees is annexed to the Eſtates, and goes along with the Eſtate, and therefore ſhall not begin before the Stranger be in poſſeſſion, 3 E. 3. 44, 45. Idle's Caſe, 28 H. 8. Dyer 10. And it may be reſembled to the Caſes of 16 E. 4. and 27 H. 8. Tenant in Tail ſold the Trees, if he dies before the Party takes them, he ſhall never have them, becauſe he hath ſtaid out his time. But it may be objected that upon ſuch a Leaſe he may reſerve a Rent, as it is in Whitlock's Caſe, Co. lib. 8. to which I will offer this difference, Leſſee for life, with power to make Leaſes for three Lives, reſerving Rent makes a Leaſe for three Lives, reſerving Rent, this Reſervation is good, becauſe it is but a Declaration of the Leaſe, and of the Rent; but if there were no ſuch Clauſe of reſerving Rent, then I conceive it were otherwiſe.

But admitting all this were againſt me, yet the Juſtification of the Defendant is not good, for by the Exception out of the Exception, the Leſſor cannot

cannot take the benefit of the Bodies of the Trees, becauſe he will thereby deprive the Leſſee of the Croppings and Loppings, &c. as in 28 H. 8. Dyer, Maleverell and Spynke's Caſe. Mylward of Lincolns-Inne for the Defendant. And firſt he conceived that the Leſſee for life without Impeachment of Waſte, might diſpoſe of the Trees in the ſame manner as Tenant in Fee might do, with this difference, that the diſpoſal thereof ought to be in his life time, and ſo it is reſolved in Lewys Bowls's Caſe, Co. lib. 11. 46.

2. The ſecond matter in the Caſe is, whether the Leſſee for life, without Impeachment of Waſte, &c. hath only an Authority, or an Intereſt in the Trees, and I conceive that he hath an Intereſt, for his power is to make Leaſes of it, or of any part for 21 years, or three Lives, and that the Conuzors ſhall be ſeiſed to the uſe of ſuch Leſſees, now when he makes a Leaſe excepting the Trees, the Trees are not demiſed, ſo that he remains ſtill Tenant for life, without Impeachment of Waſte for the Trees.

3. Excepting all Timber-trees, but for Fencing, Cropping and Lopping; it hath been objected that this Exception hath no Form: It is a general Rule, that if a Man makes a Grant, and in the cloſe thereof except all that which was granted before, the Exception is void: and this appears by 34 Aſſ. Pl. 11. A Mill was granted ſalvo ſtagno molendini: ſo here the laſt Exception takes away all that which was granted before, 38 H. 6. 38. in a Quare impedit 28 H. 8. Dyer 19. by Mountague, the cropping and lopping of Trees belong to the Leſſee, like to the Duke of Norfolk's Caſe in 12 H. 7. 25. and 13 H. 7. 13. and 18 E. 4. 14. and albeit every Grant ſhall be taken more ſtrongly againſt the Grantor, yet it ſhall have a reaſonable intendment for the benefit of the Grantor, and this appears by 7 E. 4. 22. 17 E. 3. 7. 9 E. 4. 2. 21 E. 3. 43. ſo here the Exception ſhall have a reaſonable intendment that he ſhall only have ſuch Loppings and Croppings as ſhall be beſtowed upon the Park, and no other. Doderidge Juſtice, I conceive that by the words Without Impeachment of Waſte, he hath intereſt in the Trees as long as the Eſtate continues.

2. That when he makes a Leaſe by the ſecond Power given to him, this is derived out of the Fine, and ſhall be good againſt him in the Remainder.

3. Becauſe he hath power to diſpoſe of the Trees, I conceive that when he makes a Leaſe, excepting the Trees, this is a good Exception, 24 Eliz. C. B. A Man made a Leaſe for years, now he hath the Waſte of the Trees, if he aſſign over his Eſtate excepting the Trees, the Exception is void, but in our Caſe the Leſſee hath not parted with his whole Eſtate.

4. So the ſole Queſtion is, Whether he in Remainder may cut the Trees during the Eſtate of three Lives made by Henry Sacheverel, and he conceived that he might, and ſo concluded for the Defendant: Jones Juſtice agreed, that the Leſſee for life without Impeachment of Waſte, hath intereſt in the Trees, but this Intereſt is concomitant with the Eſtate and determinable with it.

2. I conceive that the Exception is good. Such things which a Man hath by the Law he cannot reſign to himſelf upon his Aſſignment, as the cropping, and lopping of Trees, as if Tenant in Tail after Poſſibility, &c. (who is diſpuniſhable of Waſte by freedom of the Law) aſſign over his Eſtate, reſerving the Trees, he cannot cut the Trees, but here the Leſſee hath a larger liberty than the Law gives to him, and he by virtue of this may give away the Trees; but I conceive that if he had aſſigned over all his Eſtate, then he could not have excepted the Trees, but here he hath not granted over all his Eſtate, for he hath a Remainder, and may have an Eſtate in Poſſeſſion afterwards, and upon this Leaſe for three Lives he may reſerve a Rent to himſelf.

3. I conceive, that this Leaſe is derived partly out of his own Eſtate, and he hath not the meer Nomination, and partly out of the firſt Fine, and there-

fore ſuch Leſſees ſhall be ſubject to all Charges made by the Tenant for life who made the Leaſe, as Statutes, Recognizances, &c. to wit, during the life of the firſt Tenant for life.

4. When he dies who made the ſaid Leaſe for three Lives, whether he in Remainder may cut the Trees during the ſaid Leaſe; and he conceived (yet not without ſome doubt) that he had no power during the lives of the ſaid Leſſees. Whitlock Juſtice agreed with the reſt, ſo that it was agreed by all.

1. That it is a good Exception.

2. That the ſecond Leaſe is drawn out of the Fine: And the Queſtion now is, whether he in Remainder without Impeachment of Waſte with power to cut the Trees, hath power to cut them, during the lives of the ſaid three Leſſees, and the Council was commanded to ſpeak to this Point only upon another day.

The ſame Term in the ſame Court.

Foſter *and* Tayler's *Caſe.*

ERror was brought upon a Judgment given in C. B. and after the Record was certified unto this Court, the Common Pleas amended a Nature of the Record which was there, and now Bramſton Serjeant moved for the Defendant, that the Record might be amended here: Jones Juſtice, I doubt whether an inferior Court can amend after the Record is certified here, for then it is but a piece of Parchment with them: Bramſton, It is reſolved that it may in Blackamore's Caſe, Co. lib. 8. Doderidge, The Doubt is, whether it may be amended after Error aſſigned in the ſame Court, for this takes away the benefit of the Law from the Plaintiff in the Writ of Error. Jones, at another day ſaid, that if in nullo eſt erratum had been pleaded, it could not have been amended.

And as it is, it cannot be amended, becauſe now it is aſſigned for Error; and the Plaintiff was once entitled to his Writ of Error, which ſhall not be taken away from him afterwards: and in 11 Jac. there was ſuch a Caſe moved by Yelverton the King's Solicitor, and agreed that it could not be amended.

And Paſch. 17 Jac. one Abbington's Caſe upon a Nature, as our Caſe is, and it was doubted whether it could be amended: and by Broom Secondary in the ſaid Caſe, it was amended. Doderidge, In this Caſe, it may be mended, albeit it be after Error brought, becauſe it is only the Error of the Clerk, and it is amendable, although the Error be aſſigned in the ſame Point, and ſo was the Opinion of the whole Court, and therefore it was amended.

The

The same Term in the same Court.

WEld of the Inner Temple moved for a Prohibition to the Ecclesiastical Court at Worcester, and shewed for cause. 1. That the Suit there was for Money, which by the assent of the greater part of the Parishioners of D. was assessed upon the Plaintiff for the Reparations of the Church, to wit, for the recasting of their Bells, the truth is that the Charge was for the making of new Bells, where there were four before, whereby it appears that it was meerly matter of curiosity, and not of necessity, for which Parishioners shall not be liable to such Taxations, and he relied upon 44 E. 3. 19. by Finchden. 2. The Party there is over-charged, of which the Common Law shall judge. 3. The Party hath alledged a Custom that he and all those who hath an Estate in such a Tenement, have used to pay but 11 s. for any Reparation of the Church. But the Prohibition was denied, and by Doderidge in the Book of 44 E. 3. there was a By-law in the case to distrain, which is a thing meerly temporal, for which the Prohibition was granted & per Curiam, in this Case the Assessment by the major part of the Parishioners binds the Party, albeit he assented not to it: and the Court seemed to be of Opinion that the Custom was not reasonable, because it laid a burthen upon the rest of the Parish. Littleton of Council of the other side, Suppose the Church falls, shall he pay but 11 s? Whitlock, If the Church falls, the Parishioners are not bound to build it up again, which was not denied by Justice Jones.

The same Term in the same Court.

A Prohibition was prayed, because a Person had libelled in the Ecclesiastical Court for the tenth part of a Bargain of Sheep, which had depastured in the Parish from Michaelmas to Lady-day: and the Party surmised that he would pay the Tenth of the Wool of them, according to the custom of the Parish. But the Prohibition was denied: for as Doderidge Justice said, by this way the Parson shall be defrauded of all, if he shall not have his Recompence, for now the Sheep are gone to another Parish, and he cannot have any Wooll at this time, because it was not the time of Sheering. Nota, per Whitlock, de animalibus inutilibus, the Parson shall have the tenth part of the Bargain for Depasturing, as Horses, Oxen, &c. but de Animalibus Utilibus, he shall have the Tythe in specie, as Cows, Sheep, &c.

The same Term in the same Court.

UPon an Issue joyned in an Ejectione firmæ, it was found for the Plaintiff, and Lewknor moved in Arrest, &c. because the Ejectione firmæ was de Messuagio sive Tenemento, which is not good for the incertainty, and so it was resolved 12 Jac. in this Court, an Ejectione firmæ lies not, De Tenemento. Co. lib. 11. 54. Savil's Case. And it was resolved in the Exchequer-Chamber, that it lies not de pecia terræ; and in this Court in Rhetorick and Chappel's Case it was resolved that it lies not De Mess. & Tenemento.

Postea P. 203 Rochester v Rickhouse.

The

The ſame Term in the ſame Court.

Sir Robert Brown *verſus Sir* Robert Stroud.

IN Debt upon an Obligation for performance of certain Covenants contained in certain Indentures made between the Parties aforeſaid, and the Covenant upon which the Queſtion did ariſe was this: R. B. being ſeiſed of the Mannor of Dale, and S.R. S. of the Mannor of Sale, they exchanged the one for the other, and the Mannor of R. B. being more worth than the Mannor of R. S. R. S. covenanted to pay for the ſaid Mannor 1200 l. and no time was limited when the Money ſhould be paid, and the Money not being paid within a year after, R. B. bargained and ſold the ſaid Mannor by Deed indented, and inrolled to J. S. and his Heirs, and afterwards brought an Action of Debt againſt the ſaid R. S. for the ſaid 1200 l. who pleaded the matter in Bar, and Jermy argued for the Plaintiff, that this Plea ſhall not diſcharge the Defendant of the ſaid Covenant, for it is a reciprocal Covenant, and he ought to ſue the other Party for the breach of the Covenant; and it is a perfect Bargain Dyer 30. 14 H. 8. 9. and here the Agreement is in Writing, and it is good, albeit there be no limitation when the Money ſhall be paid, 37 H. 6. 9. Calthrop for the Defendant, that the Action could not lie, for the Contract is Executory, and therefore is not to pay the Money till he hath the Mannor, for the Covenant is that pro Maner. &c. he ſhould pay him 1200 l. and the word [pro] implies a Condition and Conſideration, and being Executory on the one part, ſhall be alſo Executory on the other part, 9 E. 4. 20, 21. Abridg. in Plowden 134. in Browning and Beſton's Caſe, 15 E. 4. 4. If A. grant to B. all the ancient Pale, and for them B. grants, that he will make a new Pale for A. if B. cannot have the old Pale, he ſhall be excuſed from making the new Pale, for he cannot have the one without doing the other, 6 E. 6. Dyer 75. The Contract was, pro 20. which makes a Condition, 15 H. 7. 10. by Fineaux, If a Man covenant with me to ſerve me for a year, and I covenant to give him 10 l. he ſhall have an Action for 10 l. although he do not ſerve me, otherwiſe if I covenant to give him 10 l. for his Service.

Alſo there is no time limited when the Payment ſhall be made: true it is, that in Co. lib. 6. 30. when the Act to be done is a tranſitory Act, and no time is limited there, it ought to be done in convenient time, but the Law ſhall judge of the Conveniency of this time, and the Law will never judge the time of Payment to be before he hath the Mannor, pro quo, &c.

In many Caſes when no time is limited, the Law will appoint a time, as appeareth in 33 H. 6. 48. and Perkins 799. But now in our Caſe the Law will never appoint that this Money ſhall be paid, becauſe the other Party hath diſabled himſelf to perform his part; like to Sir Anthony Maynes Caſe, Co. lib. 5. 21. Doderidge, The Bargain is not perfect, becauſe no day of Payment is limited, and the other ſhall have no Action of Debt for the Money before he hath the Mannor. Jones, If I covenant to make a Feoffment to J. S. and he covenant in conſideration of that Covenant to pay me 10 l. he ſhall have an Action of Debt againſt me, before he hath made the Feoffment.

And at another day in Trinity Term, 3 Car. Noy argued for the Plaintiff, and opened the Caſe thus: Amongſt other Covenants in certain Indentures between them it was agreed, that whereas Sir Robert Brown the Father was ſeiſed of the Mannor of Gadmaſton, with the Advowſon appendant, and Sir Robert Stroud of the Mannor of D. the ſame County, that there ſhould be an Exchange between them of the ſaid Mannors, and becauſe the Mannor of Gad-

maſton

maſton was the better, Stroud covenanted with the Father and the Son to pay 1200 l. to the Father for the Demeſns of the ſaid Mannor and Advowſon, and that at Michaelmas next enſuing, there ſhould be a mutual Entry into the ſaid Mannors, and that in the mean time either of them ſhould take the Profits of their own Mannors, and that they ſhould deliver each to other their Evidences, and that Aſſurances ſhould be made as Council ſhould adviſe; the Plaintiff declare, that they had performed all the Covenants which were to be performed on their part, and that the Defendant had not paid the 1200 l. and that thereupon this Action of Covenant was brought.

The Defendant proteſtando that the Plaintiff had performed the Covenants, and had not produced their Evidences, &c. for Plea ſaith, that the Plaintiff after Michaelmas bargained and ſold the Mannor of Gadmaſton to J. S. and his Heirs, upon which the Plaintiff demurs, and he conceived that notwithſtanding the Sale after Michaelmas, yet an Action of Covenant lies for the 1200 l. but otherwiſe it had bèn if he had ſold it before Michaelmas. But it hath bèn objected that the Money by the Covenant is to be paid pro the Mannor, and therefore becauſe the Defendant cannot have the Mannor, he ſhall not pay the Money, and for this 9 E. 4. 20. and 24 E. 3. 21. have bèn cited that [pro] implies a Condition, as pro ſervitio pro maritagio, but theſe Caſes do not reſemble this Caſe in reaſon, becauſe the Fact to be done here, reſts upon an indefinite time, and the Defendant is to do the firſt Act, and the Defendant is bound to a certain time for the doing of this Act. For the firſt it is agrèd, that the Defendant ſhall pay 1200 l. and the Plaintiff agrees to make Aſſurances for this Mannor, and that the Aſſurances ſhould be made as Council ſhould deviſe, and I conceive that the Defendant ought to procure the Council to deviſe, for mutual Aſſurances ought to be made, and either Party ought to appoint what Aſſurances he would have, and the one ought not to be a Carver to the other, neither can one know what Council the other will have, and upon this reaſon is the Caſe, 9 E. 4. 3, 4. and Plow. 15. b. the Caſe of the Bell, it ſhall be weighed by him who is to have the Profit, peradventure if it were in caſe of an Obligation to perform Covenants, there he ought to procure the Counſel, for ſaving the Penalty of the Obligation; but it is otherwiſe here in caſe of a Covenant, Co. lib. 5. 22. b. 18 E. 3. 27. and 4 E. 3. 29. If a Man be bound to be ready to levy a Fine ſuch a day, yet the other ought to bring the Writ of Covenant againſt him before that day, for otherwiſe he cannot levy a Fine.

But now the Law is altered, for now Fines are levied, and Writs of Covenant are ſued out afterwards, 17 E. 4. 2. per Pigot: If I am bound to you in 20 l. to enfeoff you at ſuch a day of ſuch Land, if you pleaſe to take the Feoffment, you are bound to let me know your pleaſure, and here the Aſſurance is for the benefit of the Defendant, and he cited Co. lib. 5. 23. and 7 E. 4. 13.

2. For the time, this Aſſurance ought to be deviſed by Council before Michaelmas, or otherwiſe the Plaintiff ſhall be enforced to kèp his Mannor all his life, and ſhall be hindred of the Sale of it for Payment of his Debts, or other Neceſſaries whatſoever. And 17 E. 3. 1. liking ought to be ſhewn in convenient time: And it appears by the Articles that the time intended was before Michaelmas, for every thing to be done by the Articles, was to be done before Michaelmas, Hill. 37 Eliz. Rot. 99. B. R. between Mills and Parſons: A Man covenanted in conſideration of 42 l. Rent to be granted to him, payable at Michaelmas and Lady day, yearly, to levy a Fine of a Mannor to the uſe of &c. and the Aſſurance of the Rent is not made before Michaelmas, and it was reſolved that the Covenant was not performed, for the Grant of the Rent ought to be before Michaelmas, for otherwiſe he could not have the benefit intended, and cited alſo Dyer 347. and 20 Eliz. Dyer 361. and in this Caſe there could be no Execution of other Articles if the Council did not deviſe them before Mich.

But

But it hath been objected that the Plaintiff hath not fully ſhewn the performance of the Covenants of their part, but only by Implication, albeit they have performed, and they have not averred that the Defendant hath not defiled.

Anſw. To which I anſwer, that this is good enough; but where I covenant to do no Act upon a future Contingent Act to be done by another, there I ought to ſhew it particularly, but otherwiſe in this Caſe, and this is for the benefit of the Defendant, and therefore he ought to ſhew it, and to this purpoſe is 3 E. 3. Fitz. Det. 157. and 18 E. 3, 4, &c. Jones Juſtice, ſuppoſe the Defendant had demanded the Aſſurance after Michaelmas, and before the Sale, what ſhall be done? Noy, nothing can be done after Michaelmas: and it was adjourned.

The ſame Term in the ſame Court.

Sanders *and others*, *verſus* Meryton.

IN an Action of Covenant the Caſe was this, Amongſt other Covenants in a certain Indenture made between Sanders and others to the Leſſees, and his two Leſſors, the Leſſors covenant to diſcharge them of all Incumbrances done by them or any other Perſon, and the Plaintiff aſſign for Breach, that one of the Leſſors had made a Leaſe, and thereupon then brought this Action. And Goldſmith moved in Arreſt of Judgment, that the Breach was not well laid, becauſe it is only laid to be done by one of them, and the Covenant is to diſcharge them of Incumbrances done by them, which ſhall be intended joynt Incumbrances. Doderidge Juſtice, the Covenant goes as well to Incumbrances done ſeverally as joyntly, for it is of all Incumbrances done by them or any other Perſon, and ſo was the Opinion of the other Juſtices, and therefore the Exception was over-ruled.

The ſame Term in the ſame Court.

Dickar *verſus* Moland.

IN Replevin, the Caſe was thus: A Man made a Feoffment to the uſe of himſelf for life, the Remainder to his Son in Tail, with Remainder over, the Defendant made Conuſance as Bayliff to the Son for 4 *s.* Rent due to him before the ſaid time, in which, *&c.* to wit, 1 Jan. 18 Jac. which time was before the death of the Feoffor, whereupon it was moved for the Plaintiff, that the Avowry could not be good, and Roll argued for the Defendant, that it is good enough, for the *Ante prædictum tempus quo, &c.* is good enough, and the (ſcilicet) is void, for by this it appears that the Rent is due to another, 20 H. 6. 15. And a (ſcilicet) is but an Expoſition of that which is, once before, and it ſhall not deſtroy the precedent matter, but if it be contrary to it, it is void, Co. lib. 5. Knight's Caſe, A ſcilicet ſhall not make an alteration of that which went before, 15 Jac. B. R. Deſmond and Johnſon's Caſe. In a Trover and Converſion the Plaintiff declared that he was poſſeſſed of the ſaid Goods. 1 Jan. 15 Jac. and that Poſtea, ſcil. the firſt day of May he in the year aforeſaid loſt them, and that they

came

came to the hands of the Defendant, and upon Iſſue joyned, it was found for the Plaintiff, and this was moved in Arreſt of Judgment, and by the Court the (ſcil.) was agreed to be void, and the Poſtea good; and the like Caſe was 17 Jac. in Debt. The ſecond Queſtion is, a Man makes Conuſance for Rent for him in Remainder in Tail, and does not alledge the preciſe time when the Leſſee for life died, but only that he died, and I conceive that it is well enough.

1. Becauſe an Avowry (which is in lieu of an Action) is a real Action, and in real Actions no preciſe day need to be alledged.

2. Becauſe he avows for 4 s. Rent due, and the Arrear to the Remainder, which implies that the Leſſee for life is dead; See 14 Eliz. Dyer. The Caſe of a Perſon, in one Arundall's Caſe; a Man was Leſſee for ninety years, if the Lady Pozley ſhould ſo long live, in an Action brought by him as Leſſee for years, in his Declaration he did not aver that the Lady Pozley was alive, and yet awarded good, Trin. 12 Jac. in Poyd and Paramoze's Caſe, the Defendant avowed as Heir of Sir John Arundell, and alledged no time in certain of the death of Sir John Arundell, and yet awarded good for the reaſon aforeſaid, and therefore he prayed Judgment for the Avowant.

The ſame Term in the ſame Court.

Jenkin *verſus* Vivian.

IN Treſpaſs, Jermy for the Plaintiff took ſome Exceptions to the Plea of the Defendant: 1. That the Defendant claim Common in Trigemore Pour ratione Vicinagii, and doth not ſay, a tempore cujus contrarium memoria hominum non exiſtit. 2. The Defendant alledgeth that he and all his Occupiers of Down-cloſe had uſed to have Common in the ſaid Tridgemore Pour, &c. whereas he ought to have ſhewn what Eſtate they had in Down-cloſe who have uſed to have this Common: Roll. there need no Preſcription in this Caſe, no more than in a common Appendant (which Caſe of a common Appendant was agreed by the whole Court) for it is mixt, 6 E. 4. 55. Co. lib. Intr. 625. tit. treſpas. For the ſecond Exception, I agree that if it be by way of Preſcription, then it is not good, as it is alledged here, but if it be way of Cuſtom (as here it is) then it is good, for a Cuſtom goes to Land, and a Preſcription to Perſons, Hill. 11 Jac. Higgs brought an Action upon the Caſe for erecting of a new Pill, and alledged a Cuſtom, that he and all the Inhabitants, &c. an Exception was taken to it, and it was there ruled that it was good, becauſe alledged by way of Cuſtom: Co. lib. 6. Gateward's Caſe, and alſo Mich. 14 Jac. it may be alledged by way of Cuſtom as our Caſe is, and 15 E. 4. when it is by way of Diſcharge, it may be alledged in all Occupiers. Jermy for the Plaintiff, it cannot be a Cuſtom here, for as it is in 23 Eliz. Dyer, A Cuſtom cannot extend to a particular place, and this was agreed by the whole Court: But there is another Exception, he claims Common in Tridgmore Pour for Cattel Levant and Couchant in Down-cloſe, and does not aver, that theſe Beaſts were Levant and Couchant upon Down-cloſe, and per totam Curiam, this ought to be averred, and it was alſo agreed that in this Caſe he ought to have preſcribed: But for the Exception of all Occupiers it was doubted: but for the other Exceptions Judgment was given for the Plaintiff. Intr. Hill. 1. Car. Rot. 331.

The ſame Term in the ſame Court.

Chamber's *Caſe.*

IT was ſaid in this Caſe, that in Debt upon a Recognizance acknowledged in Chancery, or in any other Court, the Defendant cannot demand Oyer of the Condition, for the Recognizance is not in Court as an Obligation is, when Debt is brought upon it: But if Debt be brought upon a Recognizance acknowledged in this Court, then the Defendant may demand Oyer of the Recognizance.

The ſame Term in the ſame Court.

Harison *verſus* Errington.

IN Error to reverſe an Indictment of Reſcous and Riot, taken in the County Palatine of Durham, Banks aſſigned the Errors, whereof one was, there was a Warant to three conjunctim, & diviſim to arreſt the ſaid Harison, and two of them arreſt him, and therefore the Arreſt was not well done, for it ought to have bin by one, or all three, and the reaſon is, becauſe it is a Miniſterial Act, otherwiſe if it had bin a Judicial Act, 14 H. 4. 34.

2. The Indictment of Riot was againſt three, and the Jury found only one of them guilty of the Riot, this is a void Verdict, for one alone cannot make a Riot, like to the Caſe in 14 H. 4. 2. Conſpiracy againſt two, and only one of them is found guilty, it is void, for one alone cannot conſpire. And at another day in the ſame Term Noy took other Exceptions.

1. Becauſe the Indictment is Jurator. pro Domino Rege preſentant. &c. and doth not ſay, that twelve Jurors preſentant, and peradventure but eleven did preſent.

2. The names of the Jurors ought to have bin certified, for peradventure they are not probi & legales homines, but Villains and Out-laws, 15 H. 4. 41.

3. It is found that Rolſon the Sheriff by vertue of a Writ directed to him, came, &c. and upon this Reſcous was made by Harriſon, &c. and it doth not appear what manner of Writ it was, ſcilicet, Elegit: Capias ad ſatisfaciend. or, &c. and if there were no Writ there can be no Reſcous, and albeit he had a Writ, yet if Execution were done by vertue of another Writ which he had, the Party may diſobey it, as if upon an habere facias ſeiſinam, the Sheriff makes a Warrant as upon a Capias, the Party is not bound to obey the Bayliff, if he be not a Bayliff known; but in Caſe it appears they were only Bayliffs pro hac Vice. Note, that an Indictment before Coroners, which found the Earl of B. was felo de ſe, was quaſht, becauſe it did not appear that it was per ſacramentum probor. & legal. hominum: And in the Caſe of Sarum this Term an Indictment was quaſht for the ſame cauſe.

The

The ſame Term in the ſame Court.

Rocheſter *verſus* Rickhouſe.

IN a Writ of Error to reverſe a Judgment given in **Ejectione firmæ** in **Newcaſtle**, **Wanks** aſſigned theſe Errors.

1. The Plaintiff declares of a Leaſe made **de Burg. ſive Tent.** which is not good, no more than in **Ejectione firmæ de Pell. ſive Tent.**

2. Becauſe the Judgment is not **quod capiatur** as it ought to be, becauſe it is **vi & armis.**

3. The Judgment is **Ideo conceſſum eſt**, where it ought to be **conſideratum eſt**, and for theſe Errors the Judgment was reverſed: And the ſame day another Judgment between **Bell** and **Margery Strongury** was reverſed for the ſame cauſes.

The ſame Term in the ſame Court.

Petit *verſus* Robinſon.

IN Erroꝛ to reverſe a Judgment given in C. B. in a Replevin, there Jermy foꝛ the Plaintiff aſſigned two Erroꝛs:

1. It appears, that after the Wꝛit and beforꝛe the Trial, it was coram Juſticiar. Dic. Domini Regis, and there was not any Spæch of any King but of King James beforꝛe, and there is no Spæch of his Demiſe, and therefoꝛe this ſhall be intended beforꝛe the Juſtices of King James, which cannot be.

2. Becauſe the Niſi prius is certified to be tried beforꝛe Franciſco Harvey, Mil. uno Juſticiar. &c. and the Poſtea returned, is beforꝛe Franciſco Harvey Arm. argued, and ſo there was no ſuch Judge of Niſi prius as Francis Harvey: Banks foꝛ the Defendant, I conceive the firſt Erroꝛ to be becauſe the Adjournment was per br. Dom. Reg. and King James was named beforꝛe, ſo that the Objection may be, that it ſhall be intended the Wꝛit of Adjournment of King James, which cannot be, but I conceive the Wꝛit is general, and ſhall not be intended, that it can be adjourned by the King's Wꝛit who was dead beforꝛe, and the Clerk of the Aſſiſes, who certified it, is bound to take notice of the King's death, 37 H. 6. 28. and alſo the Recoꝛd is not per br. Dic. Dom. Regis, but per br. Domini Regis, generally. And foꝛ the ſecond, I conceive it is no Erroꝛ, and if it be Erroꝛ, then if the Certificate be not accoꝛding to the Copy, out of which the Clerk certifies, it ſhall be amended, 22 E. 4. 22. 35 H. 6. 23. b. Co. lib. 8. 136. Blackmore's Caſe, which is a ſtronger Caſe than this. But it hath bæn objected, that the Recoꝛd is certified by the Juſtices, and now there can be no Averment to the contrary; but I conceive that this Court may ſend to the Clerk of the Aſſizes to amend it, and thoſe Objections were oveꝛ-ruled in C. B. in the ſame Caſe. Doderidge Juſtice, I conceive that notwithſtanding theſe Exceptions the Judgment ought to be affirmed, foꝛ as to the firſt, the Court is bound to take notice of the Demiſe of the King, and therefoꝛe it ſhall be intended the King that now is, and ſo the Wꝛit of Adjournment gwd enough, in Dyer, King Hen. 8. made a Patent, and it was Enricus Dei gratia, &c. where it ſhould be Henricus, and yet the Patent gwd; ſo in a Wꝛit to the Biſhop, the Subſcription is, Epiſcop. Nor this is gwd enough, foꝛ the Biſhop of Norwich is very well known. And foꝛ the other, I conceive it is not well alledged, becauſe it is not ſhewn whe-

ther he were a Knight at the time of the Certificate or not, and ſo may well ſtand together, that he was a Knight, for he might be an Eſquire at the time of the Trial, and before the Record certified might be made Knight. Jones Juſtice to the ſame intent, and that we ought to take notice of the Demiſe of the King, and therefore it ſhall be intended of the Writ of Adjournment of the King which now is, and therefore is no Error, and yet if it were, it were amendable: Whitlock Juſtice agreed, and therefore the Judgment was affirmed by the whole Court.

The ſame Term in the ſame Court.

Crabbe *and his Wife verſus* Tooker.

IN Covenant between Walter Crabbe and Anne his Wife, againſt Tooker, the Covenant upon which the Breach was laid, was this, Tooker the Defendant covenanted with Tooker his Son, and Anne Slade (one of the Plaintiffs, whom he intended to marry) to give them their Meat and Drink in his Houſe, and if any diſcontentent ſhall happen between the Father and Son, ſo that he, and his Wife Anne ſhould diſagree to dwell with Tooker the Father, then they ſhould have 6 Beaſts, Gates, &c. Tooker the Son died, Anne diſagrees to dwell with Tooker the Father, and marries with Crabbe, who with his Wife Anne brings this Action; and Tyler argued for the Plaintiff that the Action lies, for albeit the Covenant be in the Conjunctive (if they diſagree) yet it ſhall have a disjunctive Interpretation, as where a Man covenant to levy a Fine to one and his Heirs, if he dies the Covenantor may levy a Fine to his Heirs; and Hill and Grange's Caſe in Plow. Two Tenants in common grant a Rent, this ſhall be taken for ſeveral Rents, and Co. lib. 5. Slingsby's Caſe, alſo the Wife is Party to this Covenant, and ſhe muſt either have Remedy upon this Covenant, after the death of her Husband, or not at all, for ſhe cannot diſagree in the life time of her Husband per que, &c.

And it was agreed on the other ſide, that there ought to be a diſlike between all joyntly, the Father, the Son, and the Wife: and now one of them being dead, the Covenant is diſcharged, like to the Caſe put in Bludenel's Caſe, Co. lib. 5. If Adminiſtration be Granted during the Minority of three, if one of them dies, the Adminiſtration ceaſeth, and 31 Eliz. in C. B. A Leaſe was made to three, and the Leſſor grants to them to be diſpunishable of Waſte quamdiu cohabitarent, one of them dies, and it was reſolved, that now they ſhall be liable to Waſte. Alſo the Bar is not good, for it is pleaded that Diſcordia orta fuit, and doth not ſhew what manner of diſcord this was, and therefore not good, as 3 H. 6. In Annuity brought pro conſilio, &c. he ought to ſhew for what manner of Counſel it was: Whitlock Juſtice was of Opinion for the Plaintiff, and that this Covenant extends to the Wife, and that upon equal Conſtruction, becauſe it comes in place of the firſt Covenant, and this was intended for the benefit of the Wife, as well after the death of the Husband as before: Jones Juſtice was of the contrary Opinion, and that the ſecond Covenant was a ſeveral Covenant from the firſt, and that the diſagreement is to be made by all three joyntly, and that when one dies the Covenant is gone, 2 Eliz. Dyer, A Man will that A. B. and C. his Feoffees ſhall ſell his Land, B. dies, now the Authority is determined. The Lord Gray committed the cuſtody of his Son to four, one of them dies, the Authority is gone, and in this Caſe there is no matter of Intereſt, but an Agreement, and in ſuch a Caſe as this is a Feme Covert, hath a Will, albeit ſhe hath no legal Will; but in this Caſe there ought to be a diſagreement of both, and there ought to be a diſlike of the Father alſo, and in the Declaration it is alſo ſaid, that ſhe diſagreed.

Doderidge

Doderidge agreed with Jones, that the Declaration is not good, and that it is not warranted by the Covenant, and that the Breach is not well aſſigned. The Caſe is grounded upon the ſecond Covenant which conſiſts upon a Contingency which Contingency is, if there happen any diſcord between the Father and the Son, &c. the words are joynt, and all ought to diſagree: True it is, that in ſome Caſes a Conjunctive ſhall be taken for a Disjunctive, but this is according to the matter and circumſtances of the fact, but in our Caſe it ſhall not be taken diſjunctively. If the Father, the Son, and the Wife had diſagreed, then it is clear that an Action of Covenant lies, but this is *caſus omiſſus*, and no Proviſion for it. Alſo it is only alledged in the Declaration, that ſhe diſagreed, whereas a mutual diſagreement between all ought to be alledged, and therefore Judgment was given, *Quod querens nil capiat per billam*. But all agreed, that the Wife might have boarded with Tooker the Father, if ſhe would, but her new Husband could not.

A Thowe Serjeant took divers Exceptions to an Indictment of Forcible Entry upon the Statute of 8 H. 6. againſt Plowden and others for expelling one Syms from his Copy-hold, and the principal Exception was, becauſe (diſſeiſivit) was not in the Indictment, and in truth it cannot, for albeit the Statute of 21 Jac. cap. 15. gives power to Judges and Juſtices of Peace to give Reſtitution of Poſſeſſion to Tenants for years, and Copy-holders, in which there ſhall be an Entry, or Detainer by force, yet the Statute does not give an Indictment of Forcible Entry of Copy-hold. Noy a Copy-holder ſhall now have an Indictment of Forcible Entry, but (diſſeiſivit) ſhall not be in it, for no Jury will find that, becauſe it is not poſſible, becauſe a Copy-holder hath no Free-hold, and yet a Copy-holder ſhall have a Plaint in nature of an Aſſize againſt a Stranger, but not againſt the Lord: and at laſt the Opinion of the Court was, that the Indictment was good.

Upon a Capias directed to the Sheriff of London to take the Body of J. S. the Capias was returnable die Jovis, which was the day of All-Souls, and thereupon the Sheriff took the Party, but he returned, that becauſe the Return of the Writ was upon a day that was not Dies Juridicus, he ſuffered the Party to go at large: And the Return was holden inſufficient, for by Doderidge the Writ was good, and the taking and detaining of the Party by vertue thereof was lawful, but yet he could not have the Party there at the ſaid day, and therefore the Sheriff was compelled to bring the Party into Court, which the ſame day he did accordingly.

The ſame Term in the ſame Court.

A Man granted a Rent-charge of 12 l. to one of his Sons out of the Manor of D. by Deed, and died, the Grantee loſt his Deed, the Land is extended to I. D. by vertue of a Recognizance acknowledged by the eldeſt Son of the Grantor, the Grantee ſue for his Annuity before the Council of York to be relieved in Equity, for that in reſpect of the loſs of the Deed he could not have Remedy at the Common Law, and J. D. the Conuſee obtained a Prohibition out of this Court upon this ſurmize, that although the Council of York ſhould make a Decree, that he ſhould pay the ſaid Annuity, yet it ſhould be no Diſcharge for ſo much againſt the Conuzor, becauſe their Decree was no legal Eviction. Now came Smith of the Temple, and prayed a Procedendo for the Grantee to the Council of York, and the Opinion of the whole Court was, that a Decree, there being no legal Eviction, ſhall not be a Diſcharge for ſo much againſt the Conuzor. Doderidge, the Grantee of the Rent-charge,

charge, having now loſt his Deed, can have no Remedy in Equity, for in this Caſe Equitas ſequitur legem, and of the ſame Opinion were Jones and Whitlock: but by Doderidge) which was not denied) if the Grantee had loſt the Deed by a caſual Loſs, as by Fire, &c. in ſuch a Caſe he ſhall have Remedy in Equity: and he ſaid, that in the beginning of King James, when Egerton was Lord Chancellor, there was ſuch a Caſe in Chancery: A Grantee of a Rent-ſeck had Seiſin of it, ſo that he might have an Aſſize, and he deviſed it to J. S. the Deviſee ſued in Chancery to have his Rent and Seiſin of it, and he could have no Remedy for it in Chancery: And this was one Mallery's Caſe.

The ſame Term in the ſame Court.

ONE Hebborne was indicted for ſtopping a Way, &c. and it was moved that the Indictment was inſufficient, becauſe it is not laid that it was communis via, but only that it was a way to the Church, and per Curiam, it was good enough, and by Jones Juſtice the Indictment is good enough, although there wants vi & armis, becauſe he who is ſuppoſed to ſtop the way is owner of the Land.

In the ſame Term in the ſame Court.

AN Action upon the Caſe, upon a promiſe was brought in the Town of Northampton, and the Conſideration alledged was, that if the Defendant here in the Writ of Error, would diſcharge Bagnot of Execution, &c. that then the Plaintiff here in this Writ of Error promiſed to pay him eleven pounds, and there the Defendant pleaded, quod exoneravit illum de Executione relaravit. And Bolſtred, for the Plaintiff moved this for Error, that the Plaintiff in the inferiour Court did not ſhew by what manner of Releaſe it was, nor that it was by writing; for this being the Conſideration upon which the Action was grounded, ought to be put in certain, Mich. 15 Jac. Staple and King, Execution of a Conſideration ought to be ſhewn, 35 H. 6. 19. a Diſcharge ought to be ſhewn in certain, 22 E. 4. 43. the Lord Liſle's Caſe, and Mich. 16 Jac. in this Court Liverel and Rivet's Caſe (which was entred, Trin. 16 Jac. Rot. 322.) in an Action upon the Caſe, upon a promiſe upon Iſſue joyned, it was found for the Plaintiff, and it was moved in Arreſt of Judgment, becauſe the Conſideration was, that the Plaintiff ſhould diſcharge one Ogle, and he declares, that he did diſcharge him, and thereupon he brought this Action, and becauſe he declared but generally, quod exoneravit, the Judgment for that very cauſe was ſtayed, and 36 Eliz. one covenanted to make an Aſſurance, and pleaded generally that he had aſſured, and reſolved that it was not good, and in Roſſe and Harvy's Caſe this Term (which was entred, Trin. 2 Car. Rot. 1408.) In Covenant the Defendant covenanted to give Security, the Defendant pleaded that he offered Security, and reſolved that it was not good, per que &c. Jermy for the Defendant, that the Plea is good enough, for a Releaſe by Parol is ſufficient, I will remember but one Book, upon which I will rely, 27 H. 8. 24. Jordan's Caſe, in an Action upon the Caſe, the Defendant aſſumed to the Plaintiff, that if the Plaintiff would diſcharge J. T. of ſuch an Execution in which he is bound at the Suit of the Plaintiff, then if J. T. did not ſatisfie the Plaintiff by ſuch a day, the Defendant would do it, and they were at Iſſue upon an Aſſumpſit, and there the Count is admitted good, and he need not plead it was by Writing, becauſe the Diſcharge is good without writing, but it hath been reſolved, that if a Man be in

Execution at my Suit, and I go to the Sheriff and command him to discharge the Party, this is a good Discharge, although it be by Parol. Jones, If I say to the Sheriff, suffer the Party to go at large, this is a good Release both to the Party and to the Sheriff, and by him (relaravit) implies a sufficient Release, and therefore the Plaintiff in the Writ of Error shall be barred. And if a Man be bound to save one harmless in an Action brought upon this Obligation, he pleads that he hath saved him harmless, and shews not how, the Plaintiff demurs generally, he shall not now take advantage of it, Doderidge. The Cases put by Wolstred are not to this purpose, for all those Cases are of things in certain, and he agreed that a Release by Parol was sufficient, and the Case of 22 H. 8. is a stronger Case than this is. Whitlock agreed also, and therefore Doderidge advised the Plaintiff to be satisfied, or otherwise they would affirm the first Judgment.

Trin. 2 *Car.* In the *King's Bench.*

Cary's *Case.*

IN Cary's Case of Grays-Inn (where these words were adjudged Actionable, You a Counsellor? a Fool, an Ass, an Hang-man, a Counsellor of Law, a Fool in the Profession) it was said by Jones Justice, it was not sufficient to say, that he was eruditus in Lege, but he ought to say that he was Homo Conciliarius: and he said that in Maintainance against Boughton, it came in question upon Evidence to a Jury whether one who is a Barister may give Advice, and it was ruled he could not, albeit he had Letters Patents to enable him as fully as if he had been called to the Bar: and in Fleetwood's Case adjudged, that these words (You the King's Receiver? you are his Deceiver, are you not?) were Actionable.

The same Term in the same Court.

SIR Tho. Savill was indicted for Breach of the Peace within the Palace, to wit, for assaulting Sir Fran. Wortley, and he pleaded his Pardon, and Doderidge said, that to strike in the Palace was the loss of the Right Hand by the Law, and in this point our Law agrees with the Laws of France and Spain, and all other Nations, for as the Person of the King, so his Palace and Courts of Justice are so sacred, that such Contempts and Affronts are judged worthy of such Punishments, and said that the Book of 24 E. 3. 33. Fitzherbert Forfeiture, 22. (of which he would have Students to take notice) is, that where one came into the Palace armed, and being brought to the Bar in his compleat Armor, the cause was demanded, and he said that it was in his own defence, being in fear of a great Man then in Court, and he was committed to Prison by the Court during the King's pleasure, and his Lands forfeited during his life. Vide for the like matter, 41 E. 3. Fitzh. Coron. 280. Dyer 188. 22 E. 3. 13.

Hill.

Hill. 2 *Car.* In the *King's Bench.*

ONE Matthias Wheelhorſe was indicted at the Seſſions of the Peace, holden in the Town of Northampton, quia Noctivagus, and becauſe he divers days and nights did frequent the Houſe of &c. which was within the Liberties of Northampton, and was a ſuſpected Bawdy-houſe: and Crawley Serjeant moved that this Indictment was inſufficient for three reaſons.

1. Becauſe it does not appear in the Indictment, that the Party knew this to be a Bawdy-houſe.

2. Becauſe it is not ſaid that it was a Bawdy-houſe, but that it was ſuſpected to be a Bawdy-houſe.

3. Becauſe the Indictment is before Juſtices of Peace, Villæ de Northampt. and the Houſe is infra libertates Villæ de Northampt. and it ſhall not be intended that the power of the Juſtices of Peace extend thither, and for it ſee Co. lib. 5. 120. Long's Caſe. 13 H. 7. 33, 34. 22 H. 7. Kelleway 89. Co. lib. 9. Mackaley's Caſe: and the Court gave no Opinion concerning the Exceptions: But another thing was moved, to wit, that one could not be indicted before Juſtices of Peace for being Noctivagus, but this is to be enquired of in the Leet, and in this the whole Court was againſt him, for it is a Miſdemeanor, and it is contrary to the Statute of Wincheſter, and every one may arreſt him: And at another day he moved this laſt Exception again, and ſaid that the Juſtices of Peace have no power to fine Men that are noctivagant, yet true it is, that a Court-Leet hath ſuch a power, Raſtal. Leet 2. and true it is alſo (as it is in 4 H. 7. 1, 2.) that every one may arreſt a Night-walker, but there it is ſaid that if he appeareth to be a Man of good fame, the Party who arreſts him ought to let him go at large; and the Indictment here is only that he was Noctivagus, and it appears not that he is a ſuſpicious Night-walker: and by Doderidge and Whitlock Juſtices (only preſent) by the Common Law every Man may arreſt him who is Noctivagus, and the word (Noctivagus) implies that he was a common Night-walker, and they ſaid that Juſtices of Peace by their Commiſſion have power to take ſuch Indictments, for it is of ill behaviour, and albeit the Indictment were nought for the other Exceptions, yet being good in this, it ſhall not be quaſht, and therefore Judgment was given upon it, and the Party fined 40 s.

The ſame Term in the ſame Court.

Sparrow *verſus* Sherwood.

IN Trover and Converſion of two loads of Fitches of certain Land, &c. The Defendant juſtifie by the Command of Hare, to whom part of the Land belongs; and to one Pots, to whom another part in Right of the Lady his Wife belongs, and ſhews that part of the Fitches did grow upon the Land of one, and part upon the Land of the other, and upon this the Plaintiff demurs.

1. Becauſe he juſtifies by the Command of two generally, and he cannot juſtifie upon the Land of the one by the Command of the other, and therefore he ought to have alledged ſeveral Commands.

2. Becauſe he does not ſhew particularly upon whole Land the Fitches grew, but that part grew upon the Land of one, and part upon the Land of the other, which is incertain.

3. Becauſe

3. Becauſe the Wife of Pots is called by the name of Lady, and the Wife of an Eſquire cannot be a Lady: Doderidge and Whitlock only preſent, for the firſt were of Opinion, that it was good enough; for although it were a joynt Command, yet the Parties commanding having ſeveral Titles, it ſhall be taken as ſeveral Commands, reddendo ſingula ſingulis: and for the third, it is good enough, being in a Plea, otherwiſe, if it had been in a Writ: But for the ſecond Exception, the Bar is not good enough, becauſe uncertain, ſo that although upon other Exceptions moved by the Defendant, the Replication of the Plaintiff was not good, yet the Defendants Bar being ill, the Plaintiff ſhall have Judgment upon the Declaration: And the Plaintiff had Judgment accordingly.

The ſame Term in the ſame Court.

Riſley *verſus* Hains.

IN an Action upon the Caſe, upon an Aſſumpſit, the Plaintiff declared upon the Sale of the ſeveral parcels of Tobacco, to wit, for one parcel ſo much, for another parcel ſo much, and ſo forward, and in the Concluſion he ſaith, quæ quidem ſeperales ſummæ in toto ſe attingunt, to 55 l. which (being computed) is leſs than the Particulars, and upon Non Aſſumpſit it was found for the Plaintiff, and now Andrews moved in Arreſt of Judgment, for that the Particulars, and the ſumming up of them differs, and this being in a Declaration (which ought to contain truth) it is not good, and ſo there appears to be no cauſe of Action, 35 H. 8. Dyer 55. And Grice's Caſe in the very Point; Pich. 17 Jac. in this Court, but by Jones and Whitlock Juſtices only preſent, the Declaration is good enough, for there is a particular promiſe for every parcel, and the ſumming up of particulars is only Surpluſage and Officiouſneſs of the Clark, therefore the Judgment was affirmed: And Nota, that Jones ſaid Obiter in this Caſe, that upon a Contract, the Party to whom Payment is to be made, need not make Requeſt and afterwards it was agreed by the whole Court, that it ſhould be amended, otherwiſe it had been more.

The ſame Term in the ſame Court.

A Great multitude of Welſh-men were indicted for the death of a Man, by an Inquiſition taken before the Coroner in the County of Mountgomery in Wales, and Littleton of Council with the Welſh-men took ſome Exceptions to the Inquiſition: as, 1. That the Coroner cannot take any Inqueſt, unleſs it be ſuper viſum corporis, and to this purpoſe he cited Britton 6 Rich. 2. Coron. 107. 21 Edw. 4. 70. 2 Rich. 3. 2. This alſo is the reaſon that if a Man drown himſelf, and cannot be found, the Coroner cannot enquire of the death of this Man: but for the King to have a Forfeiture of his Goods, an Inquiſition ought to be taken before the Juſtices of Peace, as it was reſolved in this Court, Trin. 13 Jac. upon which the firſt Exception was, that the Inquiſition was taken at D. in the time of King James, ſuper viſum corporis, in D. in the time of this King, and for this he cited two Preſidents out of Coke's Book of Entries: Another Exception was, becauſe

the Inquiſition was per Sacramentum probor. & legal. hominum Com. prædict. whereas by the Statute of 4 E. 1. this Inqueſt ought to be by Men of the four Towns next adjoyning, and this ought to appear in the Indictment alſo Hill. 10 Jac. Rot. 3. Co. lib. Intr. 354. And day was given to the Attorney-general, to maintain this Inquiſition: But afterwards, Paſch. 3 Car. the Indictment was quaſhed, eſpecially for the firſt Exception.

The ſame Term in the ſame Court.

King *verſus* Merrick.

IN an Action upon the Caſe for theſe words, I charge you King with Felony, and you Conſtable (innuendo Thomas Legat) to apprehend him: And a Verdict for the Plaintiff, It was [illegible] Arreſt of Judgment by Bacon, that the words are not Actionable: [illegible] words are not, becauſe they are not an expreſs Affirmation, and for this he cited [illegible] 11 Jac. in this Court Powel and Baud's Caſe, where an Action was brought for theſe words, I have arreſted Powel of Felony, for ſtealing Sheep of mine, and adjudged not Actionable.

Alſo the Plaintiff did not ſhew in his Declaration what kind of Felony this was, and it may be ſuch a Felony for which an Action will not lie; for there are divers kinds of Felony, and a Mayhem is one kind, as appears in 40 Aſſ. Pl. 4. 6 H. 7. 1. and in this Caſe it ſhall be taken in mitiori ſenſu, and it ſhall not be intended ſuch a Felony for which he may be hanged: If one charge another with Felony becauſe he hath committed a Mayhem, it is clear that an Action will not lie.

And the other words (I charge you Conſtable to apprehend him) are not Actionable, and the words are only ſpoken to the Plaintiff: Alſo the words are laid to be ſpoken in London, and it appears that the Conſtable was of a Town in Norfolk, who cannot apprehend any one in London. Earle for the Plaintiff, It hath been argued that the words are not Actionable, becauſe Felony is a general word, and contains in it ſelf a Mayhem alſo; But I conceive that in this Caſe Felony ſhall be taken according to the general and common Acceptation, which is ſuch a Felony for which a Man may loſe his life, and for this he cited Co. lib. 4. 15. b. Yeomans charged Hext, for my Ground in Allerton Hext ſeeks my life, and if I could find John Silver, I do not doubt but within two days to arreſt him upon ſuſpition of Felony: and it was adjudged that for the laſt words the Action lies, becauſe he ſhall be impriſoned for ſuſpition of Felony, and Felony is there taken according to the common Acceptation of the word.

It hath been objected that there is no expreſs Affirmation of the Felony, but I conceive that there is, 39 Eliz. Action was brought for theſe words; I will call him in queſtion for poyſoning my Aunt, and adjudged that it lies, and Mich. 37 & 38 Eliz. Woodroſe and Vaughan's Caſe for theſe words: I did not know Mr. Woodroſe was your Brother, I will prove him perjured, or elſe I will bear his Charges: and adjudged Actionable. And Hill. 44 Eliz. Rot. 351. This Man (innuendo John Latham) hath cut my Wives Purſe, and his Father knowing of it received it of him, and the Money and Rings therein, and therefore I charge him of flat Felony: and reſolved that for theſe words (did cut my Wifes Purſe) no Action lies, for the cutting of ones Purſe only is not Felony, unleſs it be taken from the Perſon; and to receive one is not Felony, but reſolved that the laſt words were Actionable, and then it was agreed that if one ſay, that I. S. did ſee ſuch an one that had committed Felony, and did ſuffer him to flip away, I charge him of Felony, theſe words are not Actionable, and Mich. 20 Jac. in this Court that theſe words (bear witneſs I arreſt him of Felony) are

are Actionable, and therefore he prayed Judgment for the Plaintiff. Doderidge Juſtice, the Words are not Actionable: And Hext's Caſe comes not to this Caſe, for there by the word (Felony) it was manifeſt what Felony he intended by the Circumſtances of the Speech; to wit, that he meant ſuch Felony for which he might loſe his life, but the words here being general of Felony, it may be intended as well of a Mayhem as of any other Felony; for in an Appeal of Mayhem, he is arraigned as Felo Domini Regis 40 Aſſ. and the other Caſe of 44 Eliz. I do arreſt him of flat Felony, is not conſonant with with the reaſon of this Caſe, for there by the Arreſt his liberty is taken away, but in this Caſe there is no reſtraint, and it is very hard to make theſe Caſes agree together, for words are as variable as the faces of Men, &c. Jones Juſtice agreed, and he took it for a general Rule, that where words carry a double ſenſe, and there is nothing to guide the ſenſe more one way than another, there the words are not Actionable, for finis eſt legis dirimire lites: And therefore if one ſaith of another, that he hath the Pox, becauſe the ſenſe is ambiguous, it ſhall be interpreted in mitiori ſenſu, and therefore the words are not Actionable; ſo if one ſays of another, that he hath ſtolen his Apples, or his Corn, becauſe they may be Apples from the Tree, or Corn in the Field, the taking whereof is no Felony: but it was adjudged in the Common Pleas, when I was there, that theſe words, viz. Thou art a Thief, and haſt ſtolen my Corn, are Actionable by reaſon of the addition of the word Thief.

So that the ſpeaking of words of a double ſenſe are not Actionable unleſs ex antecedentibus, or conſequentibus, it can be collected that the words were ſpoken in pejori ſenſu: Then the words in this Caſe (I charge you with Felony) peradventure intend ſuch a Felony, for which he ſhall recover Damages only, which is Mayhem, and therefore no Action will lie. Theſe words (Thou art forſworn) are not Actionable, becauſe forſwearing may be in ordinary Communication, or in a Court of Juſtice, and it ſhall be taken in mitiori ſenſu: but if he ſays, Thou art forſworn in a Court of Record, it is Actionable, and if in this Caſe he had charged him with Felony, and ſaid further that he had ſtolen, &c. they would have been Actionable, but here he only charges him with Felony, which is an ambiguous word; and alſo it is no direct Affirmation, and therefore not Actionable, and Judgment was given Quod querens nil capiat per Billam.

The ſame Term in the ſame Court.

Good's *Caſe.*

GOod and his Wife brought a Writ of Error upon a Judgment, given in the Court of the Caſtle of Windſor, in an Action of Debt there, which was entred, Trin. Pich. 2 Car. Rot. 119, 120. and two Errors were aſſigned. 1. Becauſe the Judgment there is given in theſe words, **ideo conſideratum ad judicatum, & aſſeſſum eſt**, whereas it ought to be only by the word **conſideratum**, and the Judgment being the Act of the Court, the Law is preciſe in it, and therefore it hath been reſolved, that a Judgment given by the word (**conceſſum**) is not good, but it ought to be by the word (**conſideratum.**) 2. The Coſts **ex incremento**, are not ſaid to be given, **ad petitionem querentis**, as it ought to be, for **beneficium nemini obtruditur**, and therefore it hath been reſolved in this Court, that an Alien born ſhall not have **meditatem linguæ**, if he does not requeſt it, and as to this it was anſwered of the other ſide, that Coſts ought always to be aſſeſſed **ex petitione querentis**, and albeit here the requeſt of the Plaintiff was not

preciſely put to increaſe of the Coſts, yet at the beginning of the Judgment it is ſaid, **Ideo ad petitionem querentis conſideratum**, &c. And that Coſts ſhall be given **ex incremento**, ſo that this requeſt goes to all the Sentence, and by the unanimous Opinion of all the Court, the Judgment was reverſed for both the Errors, for, 1. **Ideo conſideratur. adjudicat. &c.** is not good, the Judgment being the Act of the Court, and the Law hath appointed in what words it ſhall be given, and if other words ſhould be ſuffered, great incertainty and confuſion would enſue, and needleſs Verboſity is the Mother of Difficulty. 2. The Increaſe of Coſts ought to be given **ad petitionem querentis**, and the words (**ad petitionem querentis**) being miſplaced, will not ſupply this defect, and Dammages **ex incremento** is always given **ad petitionem querent.** for as **Bracton** ſaith, **Omne judicium eſt trinus actus trium perſonarum, judicis, actoris & rei**, and if in this Caſe the uſual form ſhould not be obſerved, all would be in a confuſion, and in as much as the words are miſ-placed, it is as if they had not been put in at all, and therefore void, like to a Caſe put in **Walſingham's** Caſe in **Plowden**, where an Averment miſplaced, is, as if there were none: In this Caſe the Judgment was reverſed, and **Trin. 3 Car. in B. R. inter Hill. 2 Car. Rot. 849.** a Judgment was reverſed, becauſe it was **Ideo conceſſum & conſideratum eſt.**

FINIS.

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